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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 499

MEMPHIS NATURAL GAS COMPANY, APPELLANT,

vs.

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

FILED AUGUST 9, 1941.

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IN CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE

No. 53369 R. D.

MEMPHIS NATURAL GAS COMPANY, a Corporation, Complainant,

vs.

LEWIS S. POPE, Lawyer and Investigator for the State of Tennessee; Walter Stokes, Jr., Commissioner of Finance and Taxation for the State of Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee, Defendants

[fol. 3] ORIGINAL BILL AND PETITION FOR DECLARATION OF RIGHTS AND INJUNCTIVE RELIEF—Filed June 21, 1938

To the Honorable R. B. C. Howell, Chancellor of the Chancery Court of Davidson County, Tennessee, Part One:

Complainant respectfully shows unto the Court that:

I

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Delaware, engaged in the business of interstate transportation of natural gas and the sale thereof at wholesale. It maintains an office in the State of Tennessee at Memphis, Shelby County.

II

Defendant Lewis S. Pope is purporting to act as Lawyer and Investigator of the State of Tennessee by appointment of the Governor, as provided by Chapter 112 of the Tennessee Public Acts of 1937; defendant Walter Stokes, Jr., is the duly appointed, qualified and acting Commissioner of Finance and Taxation of the State of Tennessee; defendant [fol. 4] Roy H. Beeler is the duly appointed, qualified and acting Attorney General of the State of Tennessee.

All of said defendants are citizens of the State of Tennessee, residing in the City of Nashville.

Defendants Stokes and Beeler are charged, by virtue of their official position with the enforcement of the revenue laws of Tennessee, and defendant Pope is purporting to exercise the authority invested in a lawyer and investigator by virtue of the said Act of 1937.

Defendant Beeler is named as such because he is the Chief Law Officer of the State of Tennessee and authorized to represent defendant Stokes, Commissioner of Finance and Taxation.

III

At all times mentioned herein complaint was and is now, the owner and operator of a continuous natural gas trunk pipe line 370.5 miles in length from the gas fields near Monroe, Louisiana, known as the Ouachita Gas Field, running thence through the States of Louisiana, Arkansas and Mississippi and into the State of Tennessee.

[fol. 5] At all times mentioned herein complainant was, and is now, engaged by means of said natural gas trunk pipe line, in the transportation and delivery, at wholesale, in interstate commerce, of natural gas from said Louisiana gas fields to various points along its said trunk pipe line located in said States of Louisiana, Arkansas, Mississippi and Tennessee.

Complainant has only two customers in the State of Tennessee, to which its transports and delivers, in interstate commerce, natural gas at wholesale from said interstate natural gas trunk pipe line, to-wit, Memphis Power & Light Company and West Tennessee Power & Light Company. Complainant serves no customer at retail in the State of Tennessee.

Complainant, under contracts made and executed outside the State of Tennessee since 1928 has purchased and continues to purchase natural gas from gas producing companies owning and operating gas wells in the State of Louisiana; in 1928 complainant entered into contracts executed outside the State of Tennessee with certain utility distributing companies by the terms of which contracts complainant is obligated to transport in interstate commerce through its said trunk pipe line, and deliver at wholesale to said utility distributing companies in Louisiana, Arkan-

[fol. 6] sas, Mississippi and Tennessee, natural gas for retail distribution in said states. For the purpose of making said interstate transportation and delivery at wholesale

of said natural gas complainant caused said trunk pipe line to be constructed.

One of said contracts made and entered into in 1928 was for the transportation and delivery of natural gas in interstate commerce to said Memphis Power & Light Company, a retail distributing company supplying natural gas at retail to various domestic, commercial and industrial consumers in the City of Memphis and in Shelby County, and for consumption by said Company in the operation of its electric generating power plant; another of said contracts, made and entered into by complainant in 1931, is with said West Tennessee Power & Light Company, whereby said natural gas is transported in interstate commerce and delivered to said utility distributing company for resale at retail to various domestic, commercial and industrial consumers in the counties of Tipton, Lauderdale, Haywood, Crockett, Gibson and Madison, Tennessee.

There is no relation of agency between complainant and either of said two distributing companies, or any other relationship between them except that of seller and buyer.

[fol. 7] The interest of complainant in its natural gas ends with its delivery to said Memphis Power & Light Company and to said West Tennessee Power & Light Company, to which title and control absolutely pass upon said delivery.

Complainant, as an integral part of said natural gas trunk pipe line, owns and operates in the State of Tennessee the following miles of gas pipe line:

6.9 miles of 18 inch gas pipe line; 49.47 miles of 10 inch gas pipe line; 39.5 miles of 8 inch gas pipe line; 11.5 miles of 6 inch gas pipe line; 5.1 miles of 4½ inch gas pipe line; .7 miles of 3 inch gas pipe line, together with meter and regulator stations and maintenance camp and equipment. Said property of complainant is located in the counties of Shelby, Tipton, Lauderdale, Haywood, Crockett, Gibson and Madison, Tennessee.

At various points along said trunk line in the State of Tennessee, known as city gate delivery points, said distributing companies tap complainant's gas pipe line and the natural gas is withdrawn and moves in a continuous flow out of the pipe line of complainant into the distributing pipe lines of the Memphis Power & Light Company and of the West Tennessee Power & Light Company. The gas thus withdrawn is measured at each delivery point by a [fol. 8] thermometer and meter furnished by complainant,

which is the only manner in which the gas can be measured so as to determine the amount delivered to each of said distributing companies; in order to transport said natural gas from the State of Louisiana to the State of Tennessee the gas well pressure of said flowing gas is increased by compressor stations located along said pipe line system in the States of Mississippi, Arkansas and Louisiana. The pressure of the gas at said pipe line system before delivery to said distributing companies is very great, varying from one hundred (100) to three hundred fifty (350) pounds per square inch. In order to make delivery of said high pressure flowing gas, and necessarily incidental to such delivery, said pressure is reduced by complainant by regulators at said delivery points before said gas passes into the pipes of said purchasing distributing companies.

The natural gas transported by complainant and delivered at wholesale to said distributing companies is in continuous flow and none of said gas while in complainant's pipes comes to rest in the State of Tennessee; complainant does not own nor operate any tanks, reservoirs, or any equipment used for the storage of gas in the State of Tennessee.

After said gas is regulated and metered incident to the delivery to said distributing purchasers at said meter [fol. 9] stations, all of said natural gas, pipe lines and equipment used to transport and distribute said gas is owned, maintained and operated exclusively by said distributing purchasers.

Complainant does not own, maintain or operate any pipe lines, equipment, service lines, instrumentalities or any part of any system used in the local distribution of natural gas in the State of Tennessee, nor does it have any ownership or control of the natural gas delivered to said distributing companies after it passes the said meter station, at which point complainant delivers to said distributing companies.

IV

During the years 1932 to 1937, inclusive, none of the earnings, gross or net, of complainant have arisen from business done wholly within the State of Tennessee, but all of complainant's earnings in the State of Tennessee have arisen from interstate commerce by virtue of the contracts and operations herein set forth.

In 1928 complainant established a part of its interstate pipeline system in Shelby County, Tennessee, and extended said pipe line system to the various counties mentioned above in West Tennessee in 1931. Since that time com-
[fol. 10] plainant has discussed with officers of the Department of Finance and Taxation of the State of Tennessee, and with the office of the Attorney General of the State of Tennessee, the question of its liability for Tennessee excise tax as set forth in Chapter 21 of the Public Acts of 1923, and Chapter 44 of the Public Acts of 1927, being incorporated as Sections 1316-1328 of the Tennessee Code of 1932. A full disclosure of the nature and characteristics of the business and operation of complainant, so far as same related to the State of Tennessee, has been made to said officers. Complainant consistently maintained that all sales, revenues, and earnings derived from its Tennessee operation arose from business exclusively interstate in nature.

In 1935 said Department of Finance and Taxation considered that complainant was liable for said excise tax and caused an assessment to be made for the year 1935, and a distress warrant to be issued. A copy of the notice is attached hereto and made a part hereof, and marked Exhibit 1, which need not be copied.

However, before said distress warrant was executed the Department of Finance and Taxation referred the question of complainant's liability for said excise tax to the office of the Attorney General for the State of Tennessee. Said officer was supplied with a full factual statement of the character and nature of the operations of complainant in
[fol. 11] Tennessee. After full consideration said Attorney General, through his duly appointed assistant, rendered an opinion to the effect that the complainant was not and is not engaged in intrastate commerce; that its earnings in Tennessee result from interstate commerce, and that it enjoys no earnings in Tennessee from business done wholly within the State, and has no earnings except those arising from interstate commerce, and that complainant is not liable for said excise tax. A copy of the opinion issued by the office of the Attorney General to the Excise Division of the Department of Finance and Taxation of Tennessee is attached hereto, made a part hereof, and marked Exhibit 2, which need not be copied. Upon the issuance of said opinion the said Department of Finance and Taxation

caused said distress warrant to be withdrawn and the assessment theretofore made abated.

Complainant, by virtue of said full and complete conference and consideration of the question of complainant's liability for said excise tax, was advised and made to believe by said state officers, charged with the execution of State revenue laws, that its non-liability for said excise tax had been finally determined.

On or about April 24, 1938, complainant, without any notice of a proposed assessment, received an excise tax [fol. 12] bill from the defendant, Lewis S. Pope, Lawyer and Investigator of the State of Tennessee, for excise tax, interest and penalties alleged by said defendant to be due by complainant to the state of Tennessee for the years 1932, 1933, and 1934, aggregating $57,156.83, which was based upon the entire net income of complainants from all sources. A copy of said notice is attached hereto, marked Exhibit 3 (A & B) and made a part hereof, but which need not be copied.

Said defendant Pope requested and obtained an opinion from the defendant, Attorney General Roy H. Beeler, dated April 22, 1938, to the effect that complainant is liable for said excise tax, but complainant avers that said defendant Pope in requesting said opinion, and said Attorney General Beeler, in rendering same, have assumed facts contrary to the facts actually existing, which were fully disclosed by complainant in its former discussion with the office of the Attorney General and officers of the Department of Finance and Taxation of the State of Tennessee, on which actual existing facts there was and is no excise tax liability, and no earnings on business done within the State on which to base a claim of liability, and Assistant Attorney General Hunt had rendered his opinion that no excise tax liability existed, as above set forth.

[fol. 13] Said defendant, Lewis S. Pope, Lawyer and Special Investigator, although informed that all earnings of the complainant were from interstate commerce, and that complainant has no earnings arising from business done wholly within the State of Tennessee, on or about June 9, 1938, forwarded to complainant another tax bill for excise taxes for the years 1932, 1933, 1934 and 1935, aggregating $54,179.31, based upon all net earnings of complainant from the transportation in interstate commerce of natural gas from Louisiana into Tennessee. A copy of said excise tax

bill and notice are attached hereto, marked Exhibit 4, and made a part hereof, but which need not be copied.

Following said action by defendant Pope, complainant is informed and believes, and therefore states, that defendant Stokes, in view of the apparently contradictory opinions as to complainant's liability issuing from the office of the Attorney General, again called upon defendant Beeler for an opinion as to complainant's liability for said taxes. Defendant Beeler complied with said request and under date of June 16, 1938 rendered an opinion to defendant Stokes in effect stating that he was unable to pass upon the question of liability in view of an alleged disagreement as to the facts. Said opinion contained the following language:

[fol. 14] "This case possesses no serious difficulties after questions of fact have been determined, but it seems there are disagreements as to what the facts are * * *. Thus, it will be noted, there are disagreements of fact which I cannot undertake to determine * * * and if the Company still insists that it is not liable, the matter can be made the subject of judicial determination by proper proceedings * * *."

Thereafter, and under date of June 17, 1938, said defendant Stokes informed the complainant by letter as follows:

"June 17, 1938.

Memphis Natural Gas Company, Memphis, Tennessee.

GENTLEMEN:

Re: Excise Tax 1932-35 Inclusive—Special Investigation

This is to advise you that in compliance with the request of Honorable Lewis S. Pope, Special Investigator, and in keeping with the Attorney General's opinion of June 16, 1938, it will become my duty to issie distress warrant covering the above delinquent taxes, together with interest and [fol. 15] penalty, if payment is not received by June 22.

While the above relates particularly to the delinquency in the hands of the Special Investigator, I am causing statement to be rendered you covering the 1936 tax, which, under the opinion rendered, is due and payable.

Yours very truly, Walter Stokes, Jr., Commissioner.

WS:h."

Upon inquiry of complainant from defendant Stokes, complainant is informed, and therefore states, that the amount of excise tax claimed to be due by complainant to the State of Tennessee for the year 1936 is in the principal amount of $19,549.69, with interest of $1172.44, and penalty of $2344.80, making the total amount claimed to be due from complainant for said year the sum of $23,057.93.

[fol. 16]

V

Complainant avers that said pretended and void assessments and attempted levy of said excise tax on complainant, and threatened actions to collect said excise tax, interest and penalties from complainant by said defendants, are illegal, void, and of no effect for the following reasons:

1. Said pretended and void assessment of said excise tax is improperly and illegally based upon earnings of complainant arising out of interstate commerce, which earnings are expressly excluded from the basis of the excise tax, Section 1316, Tennessee Code of 1932.

2. All earnings of complainant in the State of Tennessee arise from interstate commerce, and no earnings of complainant arise from business done wholly within said State.

3. Said pretended and void assessment, levy and said threatened acts constitute a violation of complainant's rights as guaranteed to complainant under Article 1, section 8, Clause 3 of the Constitution of the United States, in that:

(a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.

[fol. 17] (b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.

(c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.

(d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.

VI

Said proceedings and actions of said defendants in making said illegal and void assessments of said excise tax and the threatened proceedings for subjection of defendant's property to enforce collection of said tax from complainant constitute the taking and violation of complainant's rights and property without due process of law, in contravention of Amendment 14, Section 1, of the Constitution of the United States, and of Sections 8 and 17 of Act I of the Constitution of the State of Tennessee, in that:

[fol. 18] (a) Said actions of said defendants in making said pretended and void assessment based upon earnings of complainant arising from interstate commerce are expressly prohibited by Sections 1316-1328, Tennessee Code of 1932.

(b) Said defendants are without authority under any statute to make said pretended and void assessment is attempted to be made has not received any earnings arising from business done wholly within the State of Tennessee, and all earnings of complainant in Tennessee have arisen from interstate commerce or business.

VII

Complainant further alleges that unless defendants are restrained from so doing they will, as they declare, cause distress warrants to issue and be levied upon complainant's property to enforce said void assessment, levy, demand and claim for said taxes for said years, including interest and penalties.

Complainant further avers that the enforcement of the pretended and void assessment and distraint for collection of said tax from complainant, unless enjoined, as herein prayed, will result in irreparable injury and damage to complainant, its property and its rights, and in irreparable loss, both great and immediate, so that complainant would [fol. 19] either have to conform to the illegal, void and unconstitutional actions, proceedings and demands of said defendants, or suffer a direct interference and obstruction to its ownership, operation and maintenance of its interstate pipe line operations in the State of Tennessee, as hereinafter described.

Complainant further avers that it is entitled to an injunction to restrain said defendants and to enjoin the enforcement of said assessments and threatened distraint thereunder because said assessments and threatened distraint are unlawful and void, and because the complainant in said years 1932, 1933, 1934, 1935 and 1936 did no business wholly within the State of Tennessee, and had no earnings in said years arising from business done wholly within the State of Tennessee, but all of complainant's business was interstate in character and all of its earnings arose from interstate commerce, and complainant and its business and earnings in such years are expressly made by said statute not subject to such assessments. Complainant further avers that it is also entitled to have said defendants restrained and the enforcement of said assessments and distraint thereunder enjoined in order to protect complainant's rights and to avoid irreparable injury and damage thereto, and for the further reason that complainant is without a full, [fol. 20] complete and adequate remedy at law in the premises, in that:

(1) The threatened issuance and execution of said illegal and void distress warrants by the defendants will cast a cloud, doubt and suspicion upon the title to complainant's property.

(2) Defendants Pope and Stokes have threatened the issuance of distraint warrants against complainant's property to enforce collection of the excise tax erroneously, illegally and unconstitutionally alleged to be due for the years 1832, 1933, 1934, and 1935, and defendant Stokes has erroneously, illegally and unconstitutionally made demand upon the complainant for payment of excise tax claimed to be due for the year 1936; all of which would necessitate separate payments under protest for each separate year, and separate suits for recovery of the amounts paid under protest for each year, from which a multiplicity of suits would result.

(3) Said defendant Pope, as Lawyer and Special Investigator of the State of Tennessee, claims to be empowered by Chapter 112 of the Acts of 1937 of Tennessee, to collect taxes under a contract providing to him compensation on a contingent basis, said compensation to be paid out of the amounts collected; and under said Act and

[fol. 21] contract, upon a payment under protest being made by complainant, as provided by said Sections 1790, et seq. of the Code of 1932, before said protest payment is paid into the State treasury, there will be deducted therefrom the fee of defendant Pope. The recovery by suit by complainant is thereby rendered doubtful and is not protected as provided by law in cases of other tax collecting officers and as contemplated by said Sections 1790-1795, inclusive.

(4) Said defendant Pope, as Lawyer and Special Investigator, is not required to, nor has he filed any bond as required by other tax collecting officers in the State of Tennessee. That because no bond is required of said defendant Pope, and there will be appropriated to defendant Pope a portion of any amount paid under protest as his fee, complainant's remedy will be doubtful, uncertain and insecure, and complainant, therefore, has no complete and adequate remedy at law under Sections 1790, et seq.

Complainant further avers that, being without an adequate remedy at law in the premises, only in a suit of this nature and by the injunctive process of this court can the complainant be fully protected in the enjoyment of its property and rights aforesaid guaranteed and provided for by the Cons-itution of the United States and Constitution and [fol. 22] statutes of the State of Tennessee against the said illegal, void and unconstitutional actions, proceedings and threatened actions of the defendants and the questions here involved can be adequately determined only in a suit of this nature.

Complainant further avers that without waiver of any of its defenses hereinabove set forth, respecting the alleged liability of complainant for said excise tax, the claims and demands of said defendants for the collection of said excise tax from complainant for the years 1932 and 1933 which are claimed to have become due on July 1, 1933 and July 1, 1934, respectively, are barred by the statute of limitations as prescribed by the laws of the State of Tennessee, and that any liability of complainant, if any there be, for said taxes claimed to be due on July 1, 1933, and July 1, 1934, are barred by said statute of limitations, which complainant specifically pleads in bar for said years.

VIII

Complainant alleges that its rights, status, or other legal relations, are affected by the above mentioned statutes of the State of Tennessee and the acts done, or threatened to be done, by defendants under said statutes, and that complainant is entitled to obtain a declaration of its rights, status, or other legal relations thereunder by virtue of the [fol. 23] Uniform Declaratory Judgments Act, contained in Tennessee Code of 1932, Section 8835, et seq.

Premises Considered, Complainant Prays:

(1) That the defendants named in the caption be made such by the issuance of process requiring them to appear and defend, but the oath to any answer they, or any of them, may file is hereby waived.

(2) That the rights, status, or legal relations of complainant, and of the parties, be established and declared and that the court declare and decree that the earnings of complainant for the years in question arose exclusively from interstate commerce and are not subject to the excise tax imposed by Section 1316, et seq. of the 1932 Code.

(3) That the Court declare and decree that the aforesaid actions, proceedings and threatened actions of said defendants are not warranted or permitted by said excise tax statute and that they are in violation of, and in contravention of, the rights of complainant under the Constitution of the United States and the Constitution of the State of Tennessee in the particulars mentioned in the bill, and that they are wholly void and unauthorized and as such should be enjoined.

[fol. 24] (4) That the Court declare and decree that complainant is not liable for any excise tax for the years 1932-1936, both inclusive.

(5) That a temporary injunction issue against defendants and each of them, their successors, employees, associates, agents and attorneys, restraining and enjoining them from enforcing or attempting to enforce, by distraint or in any other way or manner, said illegal and unconstitutional assessments, levy and collection, or any other assessment, levy or collection, under Tennessee excise tax law (1932 Code, Section 1316, et seq.) against complainant for the years 1932-1936, both inclusive, and that on the hearing said injunction be made permanent.

(6) That complainant may have such other and further relief general or special to which it may be entitled.

This is the first application for an injunction, or other extraordinary process in this cause.

Memphis Natural Gas Company, by Birger L. Johnson, President.

Armstrong McCadden Allen Braden & Goodman, Solicitors for Complainant.

[fol. 25] *Duly sworn to by Birger L. Johnson. Jurat omitted in printing.*

To the Clerk & Master:

Upon the filing of this bill, and upon the execution of [fol. 26] a bond as required by law in the sum of Eighty Thousand Dollars ($80,000.00) issue the Writ of Injunction as prayed in the foregoing bill.

This June 21, 1938.

R. B. C. Howell, Chancellor.

[fol. 27] EXHIBIT 1 TO BILL

Form ET-150

No. 121077

Excise Tax Bill and Notice

Corporations and Joint Stock Associations

Year 1935. Date 10/10/35.

ARTICLE XII

Code of Tennessee, 1932

Memphis Natural Gas Co.
46 Cedar Street
New York, N. Y.

Tax	$1025.18
Credit Allowed	150.00
Payable July 1, 1935	875.18
Interest	$ ———
Penalty	$ ———
Total Due	875.18

Above amount is excise tax levied under Article XII, Code of Tennessee, 1932.

This tax becomes delinquent if not paid on or before July 1, 1935.

Penalty of 1% per month and interest at the rate of 6% per annum will attach if delinquent 30 days. Interest and penalty are mandatory and will become a part of the tax after August 1st of each year.

Make Check Payable to State Comptroller. Mail Check to Excise and Tax Unit, 107 Memorial Bldg., Nashville, Tennessee.

Dancy Fort, Commissioner Commissioner of Finance and Taxation.

No. 121077

[fol. 28] Corporation Excise Tax Due and Paid

Date 10/10/35.

Memphis Natural Gas Co.
New York, N. Y.

Tax	875.18
Interest	———
Penalty	———
Total	875.18

Checked by J. S. Slack

Filed June 21, 1938.

John F. Killebrew, D. C&M.

[fol. 29] Office of Wm. J. Bacon, Sheriff

Court No.

STATE OF TENNESSEE

vs.

MEMPHIS NATURAL GAS COMPANY

Memphis Natural Gas Co., Sterick Bldg., City.

Memphis, Tennessee, January 20, 1936.

Distress warrant in the above styled cause has been placed in my hands for collection. If you will call and settle

same promptly you will be saved further costs and embarrassment.

Excise Tax	$953.95
Interest	$ ——
Court Cost	$ ——
Sheriff's Commission	$ 23.10
Total	$977.05

Wm. J. Bacon, Sheriff, by G. S. Finley, Deputy Sheriff.

Tax for year 1935.
This Is Final Notice.
Civil Dept. Room 314, Court House, Phone 6-7050.
Filed June 21, 1938.

John F. Killebrew, D. C&M.

[fol. 30] EXHIBIT 2 TO BILL

Copy of Opinion

May 4, 1936.

For some time a controversy has been pending with reference to the liability of the Memphis Natural Gas Company for excise tax under Sections 1316, et seq. of the Code of Tennessee. The entire matter reached this office when the file was referred to us for attention, with the request that we render an opinion to your Division regarding the contention of this company that its earnings in Tennessee result from interstate commerce and, therefore, are not taxable under the statute.

You will recall that the excise tax law imposes a tax upon corporations measured by their net earnings arising from business done wholly within the State "excluding earnings arising from interstate commerce."

Under the Statute referred to, a corporation doing business in Tennessee is not required to pay excise tax upon such earnings as it derives from interstate commerce. The question does not arise as to whether the State could have included earnings from interstate commerce in the measure of the tax. Indeed such earnings may have been included under the Constitution of the United States in the measure of the tax of domestic corporations or of foreign corporations doing an intrastate business. However, since

our statute explicitly excludes earnings arising from in-
[fol. 31] terstate commerce, the only inquiry is whether the earnings of the Memphis Natural Gas Company in this State result from interstate commerce.

According to the facts as revealed by the file, this company is engaged in transporting natural gas from the company's fields in Louisiana into the State of Tennessee, such transportation being made by means of a trunk line of pipe. The Memphis Natural Gas Company is not engaged in any manner in the distribution of natural gas to individual customers but it transports natural gas through its pipe lines to a point in Tennessee at which the main line is tapped by the Memphis Power & Light Company, which distributes it to customers in Memphis. The question which we are considering is not the liability of the Memphis Power and Light Company for excise tax but the liability of the Memphis Natural Gas Company.

The gas withdrawn by the Memphis Power & Light Company from the pipe lines of the Memphis Natural Gas Company is measured by a thermometer and a meter furnished by the Memphis Natural Gas Company.

The Memphis Natural Gas Company also sells and delivers from its main trunk pipe line natural gas to the West Tennessee Power & Light Company at various towns [fol. 32] in West Tennessee to which the West Tennessee Power and Light Company distributes gas. When the gas flows out of the pipe line of the Memphis Natural Gas Company into the pipe line of the distributing companies it becomes the property of the distributing companies.

Under the facts stated, the Memphis Natural Gas Company is engaged in interstate commerce. Its earnings in Tennessee result from interstate commerce and it enjoys no earnings in Tennessee except those resulting from interstate commerce. A review of all the decisions which are in point would be of no benefit. See case of State Tax Commission of Mississippi vs. Interstate Natural Gas Company, 284 U. S. 41, 76 L. ed. 156.

You are, therefore, advised that the Memphis Natural Gas Company is not subect to the excise tax law if its method of doing business is that revealed by the file, which is the method outlined above.

Yours very truly, Edwin F. Hunt (Signed), Assistant Attorney-General.

efh;ay.

[fol. 33] EXHIBIT 3-A TO BILL

LEWIS S. POPE
Lawyer and Investigator for the State of Tennessee
513-514 National Bank Bldg., Nashville, Tenn.

April 23rd, 1938.

Memphis Natural Gas Company, Memphis, Tennessee.

GENTLEMEN:

Enclosed you will find bill and notice covering your delinquent excise tax due the State of Tennessee for three years, that which was due on July 1, 1933, 1934, and 1935; this developed from the investigation which I am conducting.

We have not sufficient information before us at this time to determine the amount due for the years July 1, 1936 and July 1, 1937.

It may be that you should be entitled to some credits on the years figured, as shown by the enclosed bill and notice, depending, of course, upon the allocation of your net earnings on business done in Tennessee. If you are entitled to any credits, we will be glad to allow them upon proper showing being made.

Please let me hear from you relative to this matter.

[fol. 34] Very truly,

Lewis S. Pope (Signed), Lawyer and Investigator.

LSP:H

[fol. 35] EXHIBIT 3-B TO BILL

LEWIS S. POPE
Lawyer and Investigator for the State of Tennessee
513-514 National Bank Building, Nashville, Tennessee

STATE OF TENNESSEE EXCISE TAX BILL AND NOTICE

Sec. 1316 et seq. Code of Tennessee, 1932

Memphis Natural Gas Co., Memphis, Tennessee.

Tax (1932 Earnings)	$12,643.69
Credit (Filing Fee)	150.00
Net Tax (due July 1, 1933)	12,493.69
Penalty (1% per mo. 57 mos.)	7,121.40
Interest (6% per annum)	3,604.43

Tax (1933 earnings)	11,329.84	
Credit (filing fee)	150.00	
Net Tax (due July 1, 1934)	11,179.84	
Penalty (1% per mo. 45 mos.)	5,031.00	
Interest (6% per annum)	2,588.87	
	18,799.71	
Tax (1934 earnings)	10,251.79	
Credit (filing fee)	150.00	
Net Tax (due July 1, 1935)	10,101.79	
Penalty (1% per mo. 33 mos.)	3,333.66	
Interest (6% per annum)	1,702.15	
	15,137.60	
Total		$57,156.8

[fol. 36] Lewis S. Pope (Signed), Lawyer and Investigator for the State of Tennessee.

April 22, 1938.

[fol. 37] EXHIBIT 4 TO BILL

LEWIS S. POPE
Lawyer and Investigator for the State of Tennessee
513-514 Third National Bank Building, Nashville, Tennessee

STATE OF TENNESSEE EXCISE TAX BILL AND NOTICE

Sec. 1316 et seq. Code of Tennessee, 1932.

June 9, 1938.

Memphis Natural Gas Co., 931 Sterick Building, Memphis Tennessee.

Tax (1932 Income)	$10,008.30
Filing Fee (credit)	150.00
Tax due July 1, 1933	9,858.30
Penalty to June 1, 1938	5,816.39
Interest to 6-1-38	2,908.20
Total	18,582.89

Tax (1933 Income)	9,450.91	
Filing Fee (credit)	150.00	
Tax due 7-1-34	9,300.91	
Penalty to 6-1-38	4,371.45	
Interest to 6-1-38	2,185.71	
Total	15,858.05	
[fol. 38-40] Tax (1934 income)	7,090.56	
Filing Fee (credit)	150.00	
Tax due 7-1-35	6,940.56	
Penalty to 6-1-38	2,429.00	
Interest to 6-1-38	1,214.50	
Total	10,584.06	
Tax (1935 Income)	6,959.18	
Filing Fee (Credit)	150.00	
Tax due 7-1-36	6,806.18	
Penalty to 6-1-38	1,565.42	
Interest to 6-1-38	782.71	
Total	9,154.31	
Grand Total		$54,179.31

(Signed) Lewis S. Pope, Lawyer and Investigator for the State of Tennessee.

[fol. 41] IN CHANCERY COURT OF DAVIDSON COUNTY

INJUNCTION—Issued June 21, 1938

State of Tennessee

To Lewis S. Pope, Lawyer and Investigator for the State of Tennessee, Walter Stokes, Jr., Commissioner of Finance and Taxation, for the State of Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee, and to their Counselors, Attorneys, Solicitors, and Agents, and each and every one of them—Greetings:

Whereas, in a certain suit instituted in Part One of our Court of Chancery at Nashville, by Memphis Natural Gas

Company complainant, against Lewis S. Pope, Lawyer and Investigator for the State of Tennessee, Walter Stokes, Jr. Commissioner of Finance and Taxation, for the State of Tennessee, and Roy H. Beeler, Atty. Gen., defendants, the complainant having obtained from Hon. R. B. C. Howell, Chancellor, a fiat for a Writ of Injunction to issue to enjoin the defendants Lewis S. Pope, Walter Stokes, Jr., and Roy H. Beeler, and each of them, their successors, employees, associates, agents and attorneys from enforcing or attempting to enforce, by distraint or in any other way or manner the alleged illegal and unconstitutional assessments, levy and collection, or any other assessments, levy or collection under Tennessee Excise Tax Law (1932 Code, Section 1316, [fol. 42] etc.,) against Complainant for the years 1932-1936, both inclusive, all of which is more fully set out in the original bill filed in this cause a copy of which is served with this process and to which reference is here made, and the complainant having executed the bond required by the said fiat:

We, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said Lewis S. Pope, Lawyer and Investigator for the State of Tennessee, Walter Stokes, Jr., Commissioner of Finance and Taxation for the State of Tennessee, and Roy H. Beeler, Attorney General, and all and every person before mentioned, under the penalty prescribed by law, of your and every of your goods, lands and tenements, to be levied to our use, that you and every of you do absolutely desist from doing any and all of the things hereinabove enjoined and restrained until hearing of this cause in our said court of Chancery.

Witness Joseph R. West, Clerk and Master of our said Court, at office, the first Monday in April in the year of our Lord 1938, and in the 162 year of our Independence.

Joseph R. West, Clerk and Master. By John F. Killebrew, Deputy Clerk and Master.

[fols. 43-45] SHERIFF'S RETURN

Came to hand same day issued and executed by reading the within Injunction to Lewis S. Pope, Lawyer and Investigator for the State of Tennessee, Walter Stokes, Jr., Commissioner of Finance and Taxation, for the State of

Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee.

This June 21, 1938, at 11:15 A. M.

F. A. Carter, Sheriff, By Geo. E. Greer, D. S.

[fol. 46] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

PETITION OF MEMPHIS NATURAL GAS CO.—Filed June 24, 1938

To The Honorable R. B. C. Howell, Chancellor of the Chancery Court of Davidson County, Tennessee, Part One:

Complainant respectfully shows unto the Court that:

[fol. 47] I

Since the filing of the original bill and petition for declaration of rights and injunctive relief herein, and the granting by the Court of a fiat for the temporary injunction therein prayed, and the due issuance of said injunction, defendant Walter Stokes, Jr., Commissioner of Finance and Taxation, on the 22nd day of June 1938 formerly notified complainant that in his official capacity he is "now withdrawing the demand heretofore made upon you for payment of the 1936 excise tax," and is vacating "the assessment for such year heretofore made."

In view of such action by defendant Stokes, prior to any answer being filed herein by any of the parties defendant, complainant desires to amend its said original bill by supplementing the allegations of paragraph IV thereof to state the facts hereinabove stated, and to delete from the bill the last grammatical paragraph of said paragraph IV on page 10 of said bill; by further amending and supplementing the allegations contained in paragraph VII of said bill on page 13 thereof in sub-section (2) insofar as they relate to the threatened issuance of a distraint warrant for taxes alleged to be due for the year 1936; and by further limiting the various prayers for relief, and specifically the prayer [fol. 48] for a temporary injunction, to taxes claimed to be due from complainant for years prior to 1936, to the end that the original bill and the relief prayed thereon will relate solely to the taxes claimed to be due from complainant for the years 1932 to 1935, both inclusive.

II

Complainant further shows that in view of said amendment to its original bill, it is proper for the court to amend its fiat for temporary injunction accordingly, and the injunction issuing thereon accordingly, and that under the circumstances complainant is entitled to have the penalty of the injunction bond filed by it reduced from Eighty Thousand Dollars ($80,000.00) to the sum of Sixty Thousand Dollars ($60,000.00.)

Wherefore, Complainant Prays that its bill be amended in the particulars herein stated, and that the penalty of said injunction bond be so reduced.

Armstrong McCadden Allen Braden & Goodman,
Solicitors for Complainant.

[fols. 49-53] *Duly sworn to by J. E. McCadden, jurat omitted in printing.*

[fol. 54] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted].

MOTION TO DISSOLVE INJUNCTION—Filed June 27, 1938

Comes the defendant herein and move the Court to dissolve the injunction heretofore issued and served and to dismiss the bill filed herein for want of equity on the face of the bill and for lack of jurisdiction of the subject matter.

The bill seeks to enjoin the defendants from collecting revenue due the State, which action is expressly prohibited by Williams Code Sections 1790 to 1795 both inclusive, and the defendants, therefore, move the Court that the injunction be dissolved and the bill dismissed.

[fol. 55] Walter Stokes, Jr. Commr. Finance & Taxation, Roy H. Beeler, Attorney General, Lewis S. Pope, Lawyer & Investigator, Lewis S. Pope, Solicitor for Defendants.

[fol. 56] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted].

ORDER DENYING MOTION TO DISSOLVE INJUNCTION AND DISMISS THE BILL—June 30, 1938

This cause came on to be heard on the original bill of complainant and the motion of defendants to dissolve the tem-

porary injunction heretofore issued and dismiss the bill for the reasons stated in a written motion filed, and upon the entire record; and the Court being advised in the premises, and having heard argument of counsel of the respective parties is of the opinion that said motion to dissolve and dismiss the bill should be denied; it is accordingly ordered and adjudged that the said motion to dissolve the injunction and dismiss the bill be and the same is hereby denied; to which action of the Court the defendants excepted [fols. 57-61] in open court and prayed that their exceptions be noted of record.

Armstrong, et al., By J. E. McCadden, Lewis S. Pope, for Defendants.

[fol. 62] In Chancery Court of Davidson County

[Title omitted]

Answer of Defendants,—Filed September 28, 1938

The defendants Lewis S. Pope; Walter Stokes, Jr., and Roy H. Beeler, for answer to the bill, as amended, filed against them in this cause say:

I

The defendants admit that complainant is a corporation organized under the laws of Delaware. They deny that complainant is engaged in the business of interstate transportation of natural gas and the sale thereof at wholesale, and aver that the complainant is in no legal sense a transportation company and that it does not pretend to trans- [fol. 63] port any natural gas except its own. The defendants admit that complainant maintains an office in Memphis, Tennessee.

II

Defendants admit that they are State officers acting in the respective capacities stated in complainant's bill.

III

Defendants admit that complainant has been and is now the owner and operator of a trunk pipe line by means of which natural gas is brought into this State. The defendants neither admit nor deny complainant's allegations with

reference to the length of the said pipe line, its point of origin or the states through which it runs, and demand proof thereof if deemed material.

Defendants admit that complainant delivers natural gas in Tennessee to the Memphis Power & Light Company and the West Tennessee Power & Light Company, but deny that the complainant delivers natural gas only to said companies. The defendants deny that complainant serves no customer in Tenhessee at retail. The defendants neither admit nor deny complainant's allegation that since 1928 it has purchased natural gas from gas producing companies [fol. 64] in Louisiana, and demand proof thereof if material.

Defendants admit that contracts have been made between complainant and the Memphis Power & Light Company and between complainant and the West Tennessee Power & Light Company for the delivery of natural gas to such companies in Tennessee. Since complainant has refused to furnish defendants with copies of such contracts and did not file such copies with its original bill, defendants know none of the specific details with reference to the provisions of those contracts; defendants therefore neither admit nor deny complainant's allegations regarding the provisions of these contracts and demand strict proof thereof.

Defendants deny that the relationship of seller and buyer exists between complainant and the Memphis Power & Light Company or between complainant and the West Tennessee Power & Light Company as regards the natural gas delivered by complainant to such companies and in turn delivered by these companies to consumers at retail. Defendants aver that as regards the natural gas so handled the relationship between complainant and the said companies is that of associates. Defendants admit that the relationship of seller and buyer exists between complainant and the Memphis Power & Light Company as regards the natural gas delivered by complainant to the said company and consumed by the said company in its power generating plant.

[fol. 65] Defendants admit that complainant owns and operates in Tennessee gas pipe lines, meter and regulator stations, and that it also owns maintenance camps and equipment. Defendants have no knowledge with reference to the description, amount or location of complainant's properties in this State, and demand proof of all of com-

plainant's allegations regarding these matters. Defendants admit that at various points along complainant's trunk pipe line in Tennessee the said pipe line is tapped, and gas is withdrawn and delivered to complainant's customers and associates in this State.

The defendants have no detailed information with reference to the successive steps through which complainant takes its natural gas after it is brought into Tennessee both before it is delivered to complainant's customers and associates and also during such delivery. They neither admit nor deny complainant's allegations regarding this matter but demand proof thereof. Defendants deny that the natural gas brought into Tennessee and delivered to complainant's customers and associates in this State is in continuous flow and they deny that none of said gas while in complainant's pipe comes to rest in the State of Tennessee. The defendants neither admit nor deny complainant's allegations that it does not own or operate any tank or other equipment for the storage of gas in Tennessee, and that after the gas is regulated and metered prior to delivery by complainant none of the gas pipe lines and [fol. 66] equipment used to transport and distribute said gas after such delivery is owned by complainant; the defendants demand strict proof of these allegations.

IV

The defendants deny that none of complainant's earnings have arisen from intrastate business in Tennessee, and aver that all of complainant's earnings which were used as a measure of the taxes assessed against it arose from intrastate business.

Defendants admit that in 1935 the Department of Finance and Taxation billed complainant with excise tax for the year 1935 and caused a distress warrant to be issued for the collection thereof. The defendants admit that before the said distress warrant was executed the Department of Finance and Taxation submitted to the office of the Attorney General the question of complainant's liability for excise tax, and that the Attorney General, through one of his duly appointed assistants, advised the Department on May 4, 1936 that under the facts submitted to him the complainant was engaged exclusively in interstate commerce and was therefore not liable for excise tax. The defendants aver that the statement of facts submitted to the Assistant At-

[fol. 67] torney General at that time was not full and complete; that among other deficiencies, it failed to disclose the relationship existing between complainant and the Memphis Power & Light Company and between complainant and the West Tennessee Power & Light Company, and that it failed to reveal that the complainant sold much of its gas to consumers. The defendants admit that after the receipt of the said opinion of May 4, 1936 the Department of Finance and Taxation made no further effort at that time to collect the said tax by means of a distress warrant, but they deny that the said opinion constituted such a final determination, or that the complainant was advised that it constituted such a final determination, of complainant's tax liability as would preclude a subsequent consideration of the question upon the submission of a new and different statement of facts, or even upon the same facts.

Defendants admit that on or about April 24, 1938 the defendant Lewis S. Pope, as the result of an investigation which he was conducting in the Department of Finance and Taxation under the authority of Chapter 112 of the Acts of 1937, sent to complainant a notice billing it with excise taxes, penalties and interest thereon based upon earnings for the years 1932-1933-1934 & 1935 in the sum of $57,156.83. [fol. 68] The defendants aver that said aggregate of taxes, interest and penalties was figured upon the entire net income of complainant from all sources, because at that time the defendant Pope had no way of ascertaining the exact net income on Tennessee business. The defendants admit that subsequently representatives of the complainant furnished the defendant Pope with a statement of the net earnings of complainant arising from its Tennessee business, and that, based thereon, the defendant Pope, on or about June 9, 1938 sent to the complainant a corrected tax bill in the amount of $54,179.31.

The defendants admit that before the defendant Pope billed the complainant with the taxes in question, he requested and obtained an opinion from the defendant Roy H. Beeler, Attorney General, with reference to the tax liability of complainant. The defendants aver that the facts were submitted to the Attorney General just as the investigation had developed them to be, and that they are in no way conscious of any assumption of facts contrary to those actually existing. The defendants aver that the defendant Roy H. Beeler on or about April 22, 1938 gave an opinion

to the defendant Pope to the effect that the complainant was liable for the taxes in question.

The defendants admit that the defendant Beeler in an [fol. 69] opinion dated June 16, 1938 advised the defendant Stokes that the State should take steps to collect the excise tax assessed against complainant, and they admit that the defendant Stokes in a letter dated June 17, 1938 advised complainant that he would proceed to take such steps unless the tax was paid by June 22.

V & VI

The defendants deny that the assessment of excise tax against complainant, the computation of the said tax and the steps taken by defendants to collect the said tax were void and illegal, or violative of any of the provisions of the Federal or State Constitutions. The defendants aver that the said tax represents a legal claim of the State of Tennessee against complainant.

VII

The defendants admit that unless they had been restrained by injunctive order in this case a distress warrant would have been issued against the property of complainant to collect the taxes in question. Defendants deny that the collection of the taxes assessed against complainant by [fol. 70] means of a distress warrant would result in irreparable injury to complainant. The defendants deny that the complainant is entitled to an injunction in this cause, and aver that complainant's remedy is to pay the taxes under protest and sue to recover under the provisions of Sections 1790 et seq. of the Code. The defendants deny that the following of the remedy provided by Section 1790 et seq. of the Code by complainant would result in a multiplicity of suits and aver that a recovery of all the taxes paid for all the years in question could be sought in the same suit. The defendants aver that neither the provisions of the contract of the defendant Pope with the State of Tennessee nor the fact that he is not required to execute bond in any way affect the adequacy to complainant of the remedy provided by Sections 1790 et seq. of the Code. The defendants aver that if the complainant had paid the taxes in question under protest, had brought suit for the recovery thereof, and had been successful in such suit, the full amount

of the taxes paid would have been refunded to complainant. The defendants deny that any of the taxes sought to be collected from complainant are barred by any statute of limitations.

VIII

The defendants deny that this is a proper suit to be [fol. 71] brought under the Declaratory Judgments Act, and aver that complainant's sole remedy is a suit under Sections 1790 et seq. of the Code.

IX

The defendants aver that the Court has no jurisdiction of the subject matter of this lawsuit. The defendants aver that this bill seeks an injunction to prevent the collection of a State provolege tax and that the issuance of an injunction in such a case is expressly prohibited by Section 1795 of the Code.

X

Defendants aver that at numerous times in complainant's bill reference is made to the contracts between complainant and the Memphis Power & Light Company, and between complainant and the West Tennessee Power & Light Company. Defendants now renew their application which has already been once denied by this Honorable Court to have complainant file copies of this and any other contracts which might shed light on the issues of this lawsuit.

XI

The defendants deny complainant's allegation that all [fol. 72] of its business in Tennessee is exclusively interstate. The defendants aver that in 1928 complainant filed a copy of its charter with the Secretary of State and otherwise complied with the laws with reference to the domestication in Tennessee of foreign corporations. Defendants aver that since 1928 the complainant has paid the annual fees levied in Section 4136 of the Code and that such fees were paid voluntarily and without protest. The defendants aver that a foreign corporation whose business in Tennessee is purely interstate is not required to comply with the laws with reference to domestication, or to pay the filing fees imposed by Code Section 4136. The defendants therefore charge that complainant is, by its action in domesticating

in Tennessee and paying the said fees without protest, estopped to deny that it is engaged in a local intrastate business in Tennessee.

XII

Defendants aver that all of the earnings made the measure of the excise tax assessed against complainant arose from purely intrastate business conducted wholly within the State of Tennessee. Defendants aver that the complainant subjects the natural gas which it brings into Tennessee to various mechanical processes and that it takes the said gas through various steps, such as pressure reducing, metering [fol. 73] and regulating, both before it delivers the gas to its associates and customers and also during such delivery. The defendants aver that this constitutes the doing of an intrastate business in Tennessee and renders the earnings from the sale of the gas subject to excise tax, irrespective of the manner in which or the persons to which the gas is sold.

XIII

In the event the Court should be of opinion that only earnings arising from sales of gas to consumers are taxable, the defendants are advised, and therefore charge, that under the contracts between complainant and the Memphis Power & Light Company and between complainant and the West Tennessee Power & Light Company the relationship between complainant and such companies is not that of seller and buyer, but is that of associates pooling their profits. The defendants aver that under each of the said contracts complainant delivers gas to its associate, that its associate then distributes the gas to consumers at retail, and that the complainant and its associate then divide the net profits arising from the business. The defendants therefore aver that complainant is clearly engaged in the local business of furnishing gas to consumers in the State of Tennessee.

[fol. 74]

XIV

In the event the Court should be of opinion that only earnings arising from sales of gas to consumers in Tennessee are taxable, the defendants aver that even if they are mistaken in their belief that under the contracts between complainant and the Memphis Power & Light Company and between complainant and the West Tennessee Power &

Light Company the relationship between complainant and such companies is that of associates pooling their profits and if it should be found that the relationship actually existing is that of buyer and seller, still all of complainant's earnings made the measure of the tax assessed against it are taxable, including earnings arising from sales to the Memphis Power & Light Company and the West Tennessee Power & Light Company for re-sale to consumers, since complainant and the said companies are so interrelated and are such integral parts of the same enterprise as to render the sales made by such companies to consumers equivalent in law to sales made by complainant to such consumers. The defendants aver that complainant and the Memphis Power & Light Company and the West Tennessee Power & Light Company are merely component parts of a gigantic corporate setup which has for its object the sale and delivery of natural gas in various states, including Tennessee, and which effectuates that object by means of [fol. 75] holding companies, controlled subsidiaries and interlocking directorates. The defendants aver that the scheme under which complainant brings natural gas into Tennessee and delivers it to the said companies which then distribute it to consumers is a well devised plan to escape payment of excise tax to the State of Tennessee by means of the fiction of separate corporate existence. The defendants are advised, and therefore state, that this is a proper case for the Court to disregard the fiction of separate corporate existence, to look to the substance of the transactions rather than their form, and to hold that complainant's sales to the Memphis Power & Light Company and the West Tennessee Power & Light Company of natural gas which is then distributed by the said companies to consumers have the same effect for purposes of excise taxation as though they were sales made by the complainant direct to consumers.

XV

The defendants aver that in any event the earnings arising from sales actually made by complainant direct to consumers are earnings arising from a wholly intrastate business, and that they were therefore properly used in measuring the excise tax assessed against the complainant.

The defendants aver that the Memphis Power & Light [fol. 76] Company purchases from complainant a large amount of natural gas which is consumed by the said com-

pany in the operation of its electric power generating plant and in other operations. The defendants are advised, and therefore allege, that complainant at the same time that it entered into the contract referred to in the bill with the Memphis Power & Light Company, or at some other time, also entered into another contract with the said Memphis Power & Light Company, the said second contract providing for the sale and delivery of natural gas to the Memphis Power & Light Company for consumption at its plant. The said contract is not referred to in the bill in any manner, but the defendants aver that it is material and that it should be filed in the case at the same time the other two contracts referred to in the bill are filed.

The defendants are advised, and therefore charge, that the complainant, during the years 1932-1935, has sold and delivered natural gas direct to other consuming customers in the State of Tennessee.

XVI

All allegations in complainant's bill which have not already been admitted or denied, or confessed and avoided, are here and now generally denied, and denied as fully as though separately and specifically denied.

[fol. 77] And now having fully answered the bill, the defendants pray to be hence dismissed with their reasonable costs.

Lewis S. Pope, Lawyer and Investigator; Walter Stokes, Jr., Commissioner of Finance and Taxation; Roy H. Beeler, Attorney General.

Lewis S. Pope, Dudley Porter, Jr., Field Attorney.

[fol. 78] In Chancery Court of Davidson County

[Title omitted]

Depositions—Filed January 23, 1939

The Depositions of Henry C. Wallace and Birger L. Johnson, taken on behalf of Complainant in the above styled cause on Monday November 14th, 1938, in the offices of Armstrong, McCadden, Allen, Braden & Goodman, Commerce Title Building, Memphis, Tennessee.

DEPOSITION OF HENRY C. WALLACE

The said witness HENRY C. WALLACE, having been duly sworn, deposed as follows:

[fol. 79] Direct examination.

By Mr. Armstrong:

Q. 1. Please state your name?

A. Henry C. Wallace.

Q. 2. Mr. Wallace, how old are you?

A. Forty-eight.

Q. 3. What connection, if any, have you with the Memphis Natural Gas Company?

A. I am Vice-President.

Q. 4. Have you had any education and training as an Engineer?

A. I am a graduate engineer. Graduated in Civil Engineering at the University of Utah, and I have been in the oil and gas industry since 1920.

Q. 5. When did you become Vice-president of the Memphis Natural Gas Company?

A. In July 1934.

Q. 6. Prior to that time what connection, if any, did you have with the Commonwealth Gas Company?

A. I have been Chief Engineer of the Commonwealth Gas Corporation since August 1933.

Q. 7. How long have you been familiar with the lines, the *type* lines of the Memphis Natural Gas Company?

A. I was connected, during 1930 and 1931, as consulting engineer with a group in New York City that had been associated with the original project, and through them was [fol. 80] familiar with the operations of the company. From August 1933 on, I became very familiar with the lines and the properties, through my work as Chief Engineer of the controlling company.

Q. 8. How frequently and for what length of time have you done this. do you go over the entire lines of the Memphis Natural Gas Company?

A. Well, I would say on an average of six times a year.

Q. 9. What does the Memphis Natural Gas Company do—that is, what is its business?

A. Its business is that of transportation of natural gas.

Q. 10. Where does it get the natural gas?

A. It procures its gas through purchase contracts in the Monroe Gas Field in Northern Louisiana.

Q. 11. Does it produce any natural gas itself, or obtain all of it by purchase?

A. It obtains all of it by purchase.

Q. 12. Is that by purchase from one producer, or more than one?

A. The deliveries are actually made by several producers, although its contract for purchase is simply with one producer.

Q. 13. Now we are relating this testimony particularly to the years 1932, 1933, 1934, and 1935 inclusive——?

A. Yes, sir.

Q. 14. Did it do business the same way during all that period?

A. Yes, sir.

Q. 15. Have you a map that we can use for illustrative [fol. 81] purposes to show where the pipe lines of the Memphis Natural Gas Company begin in Louisiana, and to what places it goes?

A. I have.

(Map produced and a copy furnished to opposing counsel.)

Q. 16. Mr. Wallace, you produce what purports to be a map which bears the legend "Memphis Natural Gas Company Pipe Line System, July 1938", and I will ask you whether that is correct as of the years I have mentioned, 1932 to 1935 inclusive?

A. It is. There have been no additions since that time.

Q. 17. So that this map you produce is correct for the years 1932 to 1935 inclusive, is that correct?

A. That is correct.

Q. 18. Now Mr. Wallace, please make that map, as I say, for illustrative purposes, Exhibit "A" to this, your deposition?

A. I do so.

Said map was accordingly marked for identification, Exhibit "A" to the deposition of Henry C. Wallace, and the same is hereto attached, and made a part hereof, and is in the words and figures following, to-wit:

[fol. 82] Q. 19. Did you make this map yourself? I take it you did not.

A. I did not. It was prepared in our office by our engineering force.

Q. 20. Do you or not know from your actual experience and observation, having gone over the lines many times, that this map is or is not correct?

A. I know it is correct.

Q. 21. Now it begins with the intake of gas where?

A. The intake is near the station which is known as Guthrie, Louisiana, and we call it the Guthrie Compressor Station.

Q. 22. All right. Now write on the map in ink the word "Intake"——?

A. The legend indicates it.

Q. 23. You say the legend does indicate that?

A. Yes, sir.

Q. 24. In other words, the Guthrie Compressor Station. From Guthrie, Louisiana, where does the line extend?

A. The line then extends in a northeastwardly direction across the Arkansas—Louisiana Bound-ry, a few miles south of the town of Wilmot, Arkansas, and continues on in the same direction, crossing the Mississippi River just south of Greenville, Mississippi. It then changes direction slightly, but continues at a northeastwardly direction to the City of Memphis, Tennessee, Memphis being the end of the eighteen inch section of line.

Q. 25. From Memphis where does it go?

A. From Memphis there is an extension of the main [fol. 83] line continuing on into West Tennessee in a northeastwardly direction.

Q. 26. Now then I notice on this map what appears to be a spur that goes off of that line in Chicot County, Arkansas, northwest towards Lake Village, is that right?

A. That is what we call the McGeHee lateral that runs to the town of McGeHee, Arkansas.

Q. 27. Now then how many miles of pipe line in the aggregate has the Memphis Natural Gas Company had all during those years? You may refresh your recollection by any memorandum you have made of that.

A. I have a memorandum here showing the total mileage by sizes of lines.

Q. 28. Let's get the aggregate first, and then we will break it down.

A. The total mileage is 369.86 miles.

Q. 29. That is the total mileage?

A. Of all sizes.

Q. 30. And that covers the description you have already given of the line, is that correct?

A. Yes, sir.

Q. 31. All right. Now give us the mileage of the various sizes of lines and tell us between what points those sizes were in existence during those years?

A. The total mileage of 18 inch line is 211.4.

Q. 32. Running from where to where?

[fol. 84] A. Running from Guthrie, Louisiana, to the City of Memphis, Tennessee.

Q. 33. All right——?

A. The total mileage of ten inch line is 59.47.

Q. 34. Running from where to where?

A. The ten inch line extends from the City of Memphis northerly to a point between Memphis and Jackson.

Q. 35. How can you locate that point? How can you identify it on the map?

A. The ten inch line extends to Ripley.

Q. 36. Then from Ripley to Jackson, what?

A. From Ripley to Jackson the line then is eight inches.

Q. 37. What is the mileage of that?

A. The total mileage is 61.75.

Mr. Armstrong: Wait a minute now; read the question, Mr. Stenographer.

(Question and answer of the witness read by the Reporter.)

The Witness: That is an error; the eight inch line from Ripley to Jackson is 39.5 miles.

Q. 38. How much eight inch line altogether is there?

A. 61.75 miles.

Q. 39. How do you make up the difference?

A. The balance of the eight inch line extends in Mississippi from Greenville towards Greenwood.

Q. 40. What is the size of the line that goes up to Mc-

[fol. 85] GeHee, Arkansas?

A. That is a six inch line.

Q. 41. How much of that is there?

A. 19.85 miles.

Q. 42. Now for the purpose of convenience, make that memorandum from which you have refreshed your recol-

lection Exhibit B to your testimony. Show it to Mr. Pope, first. (Document handed to Counsel.)

Mr. Pope: Did you make this memorandum yourself?

A. It was made from our records in the office. I did not make it.

Mr. Armstrong: Do you know it is correct?

A. Yes, sir.

The said document was accordingly marked, for identification, Exhibit B to the testimony of Henry C. Wallace, and the same is hereto attached and made a part hereof, and is in the words and figures following, to-wit:

[fol. 86] Q. 43. All right now, that gives the total mileage of the pipe lines. Now in transporting natural gas from one State to another as you do in this instance from Louisiana to Arkansas, Mississippi and Tennessee, what are *and* mechanics of it? How do you get the gas to flow from Guthrie, Louisiana up into Arkansas, Mississippi and Tennessee?

A. The flow of gas of course is caused by difference in pressure. When the line was first built the natural pressure in the Monroe field was sufficient to transport gas to supply the markets with only two compressor stations and we had up until recently only two stations, one at Guthrie, Louisiana, one at Benoit, Mississippi. The purpose of those stations is to increase the pressure at the intake end of the line, in order to increase the velocity, and in consequence the volume that can be transported.

Q. 44. Mr. Wallace, you did not exactly answer my question, but I take it from your answer that it is transported by putting the gas into the pipes and then compressing it in order to accentuate the flow, is that correct?

A. That is correct, yes.

Q. 45. Now what is a compressor station?

A. A compressor station is a plant equipped with gas compressors and the necessary power to drive the compressors.

Q. 46. Well, what similarity if any is there between a gas compressor, for instance, and a machine that compresses air?

[fol. 87] A. There is none.

Q. 47. You say it compresses it. What does it do when it compresses it?

A. Well, actually it confines a given volume of gas in a smaller space than it formerly held.

Q. 48. What furnishes the power to operate compressor stations?

A. Gas engines.

Q. 49. Natural gas?

A. We use natural gas, yes.

Q. 50. Use your own gas?

A. No, we use purchased gas.

Q. 51. How many of these compressor stations were on this line, and where were they, during the years 1932 to 1935 inclusive?

A. There was two stations. One at Guthrie, Louisiana, and one at Benoit, Mississippi.

Q. 52. That is, the years 1932 to 1935?

A. Yes, sir.

Q. 53. Were those compressor stations used for any purpose during those years except the incidental purpose of transporting natural gas?

A. No, they were not.

Q. 54. Now how many crews does it take, or did it take in those years——?

Mr. Pope: Pardon me, Mr. Armstrong; I expect that, strictly, under the agreement we have, that leading ques- [fol. 88] tions would have to be excepted to at this time, wouldn't they?

Mr. Armstrong: I expect so.

Mr. Pope: I was thinking about your using the word "incidental".

Mr. Armstrong: Just note the exception.

Q. 55. State what use, if any, is made of these compressor stations except to help with the flow of the gas? What other use, if any?

A. That is their sole function.

Q. 56. Talking about a crew to operate these compressor stations, how many of them are in a crew? How many people in a crew?

A. Well, on our station——

Mr. Armstrong: We are not interested in any others.

A. (Continuing): The crew required consists of an engineer and an oiler on each shift, and they work eight hour shifts, so the crew at each station consists of six men.

Q. 57. And during those years you have already said you had a crew of this kind at Benoit, Mississippi, and Guthrie, Louisiana, is that correct?

A. Yes, sir.

Q. 58. Now on this map Exhibit "A" to your testimony I notice in the width lines you have a parallelogram with a black center, marked "Compressor station". Does that indicate the compressor stations?

A. Yes, sir, it does.

[fol. 89] Q. 59. Now during the years 1932 to 1935 what did you do with this gas you so transported from Louisiana through Louisiana to Arkansas, Mississippi and Tennessee? What became of it?

A. We delivered it at various points to the buyers which we had under contract to purchase this gas.

Q. 60. All right now, let's take the State of Arkansas. How many buyers did you have in the State of Arkansas?

A. One.

Q. 61. What was it?

A. The Arkansas Power and Light Company.

Q. 62. What business was the Arkansas Power and Light Company in during those years?

A. In the public utilities business.

Q. 63. What did they do with the gas?

A. It, in turn, distributed the gas to its customers on its own distribution line.

Q. 64. How many customers during those years did you have in the State of Mississippi?

A. One.

Q. 65. What was it?

A. Mississippi Power and Light Company.

Q. 66. What was its business?

A. The same, public utilities.

Q. 67. Engaged in the retail distribution of gas, among others?

A. Yes, sir.

[fol. 90] Q. 68. How many customers during those years did you have in the State of Tennessee? I say, you, I mean, the Memphis Natural Gas Company.

A. In the State of Tennessee we had two customers; the Memphis Power and Light Company, and the West Tennessee Power and Light Company.

Q. 69. What business were they in during those years?

A. They were in the business of retail distribution of gas and electricity.

Q. 70. Were they, or not, public utilities, during those years?

A. Yes sir.

Q. 71. Now in making your deliveries of this gas we will confine ourselves largely to Tennessee—at what points in Tennessee, for instance, did you deliver gas to the Memphis Power and Light Company during those years?

A. We delivered gas to the Memphis Power and Light Company at the Brooks avenue Measuring Station, and also at several other points where we had measuring stations in Shelby County.

Q. 72. What was your main delivery point?

A. The main delivery point was, and still is, the Brooks Avenue Station.

Q. 73. Is that true of all those years mentioned?

A. It is.

Q. 74. The Memphis Power and Light Company, did it, or not, supply the City of Memphis with natural gas during those years?

[fol. 91] A. It did.

Q. 75. Where did you deliver the gas that was re-sold to the City of Memphis, to the Memphis Power and Light Company?

A. At the Brooks Avenue Station.

Q. 76. What have you to say as to whether or not during those years the Memphis Power and Light Company also served certain other municipalities in Shelby County with natural gas? If it did it, what other municipalities, do you know?

A. I cannot answer accurately as to just which communities were served in the year 1932. They have taken these communities on gradually, and at the present time we have ten measuring stations in Shelby County for the delivery of gas to those small communities.

Q. 77. Regardless of the number, during the years 1932 to 1935 I want you to explain whether or not in delivering this gas to the Memphis Power and Light Company for use by their stations by distribution, you delivered, in each

instance, the gas to the Power and Light Company at what we call the City Gate of those other municipalities,—did you, or not?

Mr. Pope: The defendant excepts to this question because it is leading.

Q. 78. Did you, or not? Go ahead and answer.

A. We delivered the gas to them in all cases right out of our main line.

Q. 79. Right there, following that up, these delivery [fol. 92] points that you have referred to, what have you to say as to whether they were on branch lines of your pipe lines, or on your main line in each instance, or what are the facts about that?

A. They are on our main line up into West Tennessee.

Q. 80. What about the Brooks Avenue Station?

A. Well, the Brooks Avenue Station is the termination of the 18 inch line.

Q. 81. Now in measuring natural gas in order to tell how much you deliver or what you do with it, what is the unit of measurement?

A. One cubic foot.

Q. 82. It is measured by the cubic foot, then?

A. With certain factors stipulated, of course, in any gas measurement contract, as to temperatures and pressures.

Q. 83. Now after you deliver this gas to the Memphis Power and Light Company in the one instance, and the West Tennessee Power and Light Company in the other instance, what control if any, does the Memphis Natural Gas Company have over the gas after delivery?

Mr. Pope: Just a moment: Defendants except to this question because it asks the opinion of the witness on a matter that is included in a written contract, and which is the best evidence, and defendants insist that the question is incompetent.

(Question read by the reporter on request of Mr. Armstrong.)

A. We have no control over it.

[fol. 93] Q. 64. What have you to say as to whether or not the gas is stopped or held, or whether the flow is continuous through your pipe line on into those of the Memphis Power

and Light Company and the West Tennessee Power and Light Company?

A. The flow never ceases. It is continuous.

Q. 65. Now then you said something about measuring gas. How do you measure—that is, how does the Memphis Natural Gas Company measure the amount of gas it delivers to the Memphis Power and Light Company and the West Tennessee Power and Light Company?

A. The gas is measured according to standard practice in the industry by means of, in the case of Brooks Avenue, a large orifice meter station.

Q. 66. Just explain briefly in language so that we laymen can understand, what you mean by "orifice meter"?

A. In measuring gas with an orifice meter, a very accurately measured orifice or opening in a restriction is inserted into the pipe line, and then by means of the difference in pressures on the upstream and downstream side of the orifice, we are able to measure the amount of gas that passes through during any period. Those pressures, of course, are recorded on charts, and the charts are the basis of the measurements.

Q. 67. Do you, or not, have a meter of some kind, either orifice meter or some other kind, at each delivery point where you make delivery to the Memphis Power and Light Company and West Tennessee Power and Light Company? [fol. 94] A. We do at every point where we deliver gas to them. We measure it.

Q. 68. Who reads those meters?

A. We do.

Q. 69. The Memphis Natural Gas Company?

A. Yes, sir.

Q. 70. All right. Now then these compressor stations and these meter pressure stations keeping up the flow of the gas as you have described, and the meter stations for measuring it, what other functions, if any, do they serve except as an incident to keeping up the flow of the gas and measuring what you actually deliver to those customers? Do they do anything else?

A. That is their only function.

Q. 71. What use, if any, would you have for them, if you were not engaged in the transportation of gas from Louisiana to these other States?

A. Why, they would not, in that case, be of any use to us.

Q. 72. Now in making your deliveries to the West Tennessee Power and Light Company I will ask at how many different points you make deliveries to them?

A. Approximately seven points.

Q. 73. Approximately seven points. State whether or not in each instance those points are at or near a municipality which the West Tennessee Power and Light Company [fol. 95] serves as a Public Utility?

A. They are, in each case.

Q. 74. Does the Memphis Natural Gas Company or did it during the years 1932 to 1935 inclusive, own any facilities incident to the distribution of natural gas, after it had once delivered it to the Memphis Power and Light Company and the West Tennessee Power and Light Company?

A. No sir.

Q. 75. What is the pressure ordinarily, within variations, in the main pipe lines, of this natural gas? How does it run?

A. It will vary between four hundred pounds and one hundred pounds.

Q. 76. Now in making deliveries to the Memphis Power and Light Company in the one instance, and the West Tennessee Power and Light Company in the other, do you make deliveries at varying pressures, or do you attempt to make the delivery at a constant pressure.

A. We attempt to keep sufficient pressure back of the regulator station to insure the supply of gas for them at all times. Yes, to answer your question, we attempt to make the delivery at a constant pressure.

Q. 77. In order to obtain this constant pressure what if anything is necessary in connection with the delivery for you to do?

A. It is necessary for us to keep in touch with the require- [fol. 96] ments of the various markets from hour to hour, and to operate our stations and our line to suit the conditions that prevail at any time.

Q. 78. What I am getting at is do you have to have any machinery of any kind in your attempt to deliver this gas at a constant pressure?

A. A regulator.

Q. 79. What is a regulator?

A. A regulator is a valve which operates automatically, the purpose being to control pressures.

Q. 80. Has that regulator any function except—what other functions, if any, has the regulator, other than as incident to keeping the pressure constant for purposes of delivery? What other functions, if any?

A. None, unless you would consider that it was for safety.

Q. 81. Then in addition to the pipe lines themselves—I say pipe lines because of their varying diameter, the compressor stations, the measuring meters, and the regulators, what other machinery, if any, does the Memphis Natural Gas Company have in connection with the transportation and sale of natural gas?

A. The only other equipment which we use is a telephone line which extends the length of the main line.

Q. 82. All right now, that telephone line you say extends the length of the main line?

A. Yes sir.

[fol. 97] Q. 83. Is that a private or public telephone line?

A. That is a private line.

Q. 84. And where is it built with relation to the pipe lines themselves?

A. It is built just alongside the line on the easement on which the line is laid.

Q. 85. What is the purpose of that telephone line? What purpose does it serve?

A. It enables the dispatcher at Memphis to control the input of gas. It enables the maintenance crews to report troubles, and has the same function as a telegraph wire has alongside a railroad.

Q. 86. You say a telegraph wire alongside a railroad. Are you speaking about a line like the Western Union, or the railroad lines?

A. No. The dispatching line.

Q. 87. How frequently do you have a box where that telephone line can be tapped?

A. We have a box at each gate valve, which is approximately every five miles, and the patrolmen and line-walkers carry portable boxes which they are able to plug in at any point.

Q. 88. What method of inspection, if any, did you have during those years, of your pipe lines?

A. We employ line-walkers to cover the line completely on an average of every two or three days.

[fol. 98] Q. 89. What crews, if any, do you have with reference to maintaining your line, making repairs, and things of that kind?

A. We had at that time and still have maintenance crews. One headquartered in Arkansas; one in Clarksdale, Mississippi; and a small crew quartered in Memphis, Tennessee.

Q. 90. What do those crews do, if anything?

A. They keep the right of way in condition, repair leaks or damages that are reported by the line-walkers. Generally maintain the system in working condition.

Q. 91. Did the Memphis Natural Gas Company in those years, 1932 to 1935 inclusive, have an office in Memphis, Tennessee?

A. It did.

Q. 92. What did that office do?

A. The books and records of the company are kept in that office. The engineering department makes its headquarters in that office. And it is the principal office of the company.

Q. 93. Under what laws, of what State, is the Memphis Natural Gas Company incorporated?

A. Under the Laws of the State of Delaware.

Q. 94. Does it have an office in Delaware?

A. Yes sir.

Q. 95. Does it have one in New York, or not?

A. They do not. They maintain a transfer office in New York for the purpose of transferring stock.

Q. 96. Now this Memphis office, was there any particular reason in locating that in Memphis, other than the size of [fol. 99] the City? A matter of convenience, was it, in having that in Memphis?

A. Because the largest customer they had was in Memphis. I think that is probably the sole reason.

Q. 97. What business, if any, did this office transact during those years, except as relating to the transportation and sale of this natural gas which you have explained? 1932 to 1935.

A. None that I know of.

Q. 98. What if anything has the Memphis Natural Gas Company done with reference to acknowledging the jurisdiction of the Federal Power Commission, as being engaged in Interstate Commerce, under the Natural Gas Act?

A. They have complied with their instructions to date, as far as the furnishing of records, maps, inventories, contracts and so on.

Q. 99. This map, Exhibit A to your testimony, what if anything does that have to do with the report you made under the Natural Gas Act?

A. This map was prepared expressly for that purpose, to be submitted to the Federal Power Commission.

Q. 100. During those years what was the relation between the Memphis Natural Gas Company and the Memphis Power and Light Company, and the Memphis Natural Gas Company and the West Tennessee Power and Light Company, with reference to this transportation and delivery [fol. 100] of gas?

A. Their relation was that of seller and buyer.

Mr. Pope: This question and answer is excepted to because it is a legal conclusion.

Q. 101. After your delivery in the one instance to the Memphis Power and Light Company, and in the other instance to the West Tennessee Power and Light Company, did you have any control, and if so what control, over this natural gas, after this delivery?

A. After the gas passes through the regulator stations we have no control over it whatsoever.

Q. 102. Who owned, in the one instance when you delivered to the Memphis Power and Light Company, and the other instance when you delivered to the West Tennessee Power and Light Company, all of the appliances and distribution pipe lines and things of that kind, meters, incident thereto, with reference to the distribution of this gas to retail customers at those points?

A. Those facilities were owned by the Memphis Power and Light Company and the West Tennessee Power and Light Company.

Q. 103. You have already said that during those years the gas was at continuous flow, and I want to ask you whether or not in those years the Memphis Natural Gas Company had any reservoirs anywhere, either in Tennessee or elsewhere, or storage tanks, for the storage of natural gas?

A. We did not.

[fol. 101] Mr. Armstrong: I think that is all.

Cross-examination.

By Mr. Lewis S. Pope:

Q. 104. Mr. Wallace, where is your home?

A. In New York City.

Q. 105. Do you visit quite frequently the territory where your company is operating?

A. Yes, sir.

Q. 106. About how frequently?

A. I would estimate that fifty per cent of my time is spent outside of New York. Some years more.

Q. 107. Has your company any operations except the ones shown on this map which you have filed as Exhibit A to your testimony?

Mr. Armstrong: Are you relating that to those years, or generally, Mr. Pope?

Mr. Pope: Those years involved in this suit.

The Witness: When you say my company, you refer to the Commonwealth Gas Corporation, I take it?

Q. 108. Well, you said you were Vice-President of the Complainant herein?

A. That is correct.

Q. 109. I am now asking with reference to that company, the Memphis Natural Gas Company?

A. The Memphis Natural Gas Company owns some old——

[fol. 102] Mr. Armstrong: He is asking about from 1932 to 1935, Mr. Wallace.

A. (Continuing) No, they have no other interests outside of the system that is shown on the map that we have submitted.

Q. 110. That is all the pipe lines they own?

A. Yes, sir.

Q. 111. Well, when you are away from home fifty per cent of the time, is that on business of the company herein, or business of some other corporation?

A. I would estimate that one third of my time is spent on business of the Memphis Natural Gas Company.

Q. 112. Where do you spend that time, mostly, with reference to the complainant's business?

A. Various points along the line. Principally at the compressor stations and in the office here at Memphis.

Q. 113. When you have any business connected with the administrative part of operation of the line you, of course, do that through the office in Memphis?

A. Yes, sir.

Q. 114. Now if I understand you, the Memphis Natural Gas Company buys natural gas in Louisiana?

A. That is correct.

Q. 115. In what you call the Monroe Field?

A. Yes, sir.

Q. 116. Is that the only place that you ever buy any gas?

[fol. 103] A. That is the only place where they purchase gas.

Q. 117. Do they manufacture any gas?

A. They do not.

Q. 118. What is the pressure of this gas when you receive it in the Monroe Field?

A. It varies from one hundred fifteen to one hundred thirty five pounds. That is an average range.

Q. 119. For the enlightenment of us who are not very familiar with Natural Gas operations, just what do you mean by pressure?

A. Pressure is the unit to describe the difference between any gas or liquid as compared to the natural pressure of air. When we say that gas has a pressure of one hundred fifteen pounds, it is the weight per square inch that that gas will impose on a surface.

Q. 120. In other words on the same principal as if you were pulling an object, it would be the number of pounds you could exert to move that object?

A. Yes, sir.

Q. 121. If there was no pressure, in other words, the gas would remain still?

A. That is correct.

Q. 122. Dead?

A. The lowest pressure, unless you have a vacuum, is of course the natural pressure of the air.

Q. 123. Well, there is no air in the pipelines, is there?

[fol. 104] A. Well, what I mean by that is speaking generally atmospheric pressure is the lowest possible pressure.

Q. 124. Now you say it comes into the pipe lines in the Monroe field at the pressure of what, again?

A. Varying from approximately one hundred fifteen to one hundred thirty five pounds.

Q. 125. Now does that keep up, that same pressure, any distance, or does it lose as it continues on some distance?

A. We immediately take it at that pressure through what is known as a suction line and compress it and increase

the pressure sufficiently to get the required volume of gas through the line which we have.

Q. 126. The amount that you get in depending upon the pressure that you have, or the speed at which it will travel, in other words, would be a layman's way of expressing it, wouldn't it?

A. Yes, sir.

Q. 127. Now what did you say the distance was from Memphis to Monroe?

A. Two hundred eleven miles.

Q. 128. How many times between the field and Memphis do you speed up this pressure?

A. That varies seasonally. We have four stations where that is possible. Two of these stations are always in operation.

Q. 129. And they are located where?

A. The field station at Guthrie, Louisiana, and the one [fol. 105] approximately midway of Benoit, Mississippi, then we have two others, smaller stations, which are used during periods of big demands.

Q. 130. Where are they?

Mr. Armstrong: Excuse me, I don't want to interrupt the answer but are you relating these things to 1932 to 1935—because you are answering in the present tense?

Mr. Pope: I assumed that the witness understood that I am talking about 1932 to 1935, covering the four years.

Mr. Armstrong: The reason I am asking, there is a difference in those times.

The Witness: Yes, there is a great difference, and it slipped my mind, so we had better go back over that.

Mr. Pope: Just correct it any way you see proper.

A. During the years 1932 to 1935 we had three such stations, one at Guthrie, Louisiana, and the one at Benoit, Mississippi. And one at Memphis, Tennessee. The one at Memphis Tennessee, has been dismantled. I forgot that for the moment.

Q. 131. How long did the one at Memphis—did you maintain that one?

A. As a matter of fact it never was used. It was constructed in 1931 to boost the gas into the West Tennessee lines and the West Tennessee main line, but the market which had been anticipated in West Tennessee never developed to the extent where it was required.

[fol. 106] Q. 132. You mean it never had operated at all?

A. Never was operated.

Q. 133. Then you still just have two—that is, during the whole time up including 1935?

A. Yes sir. But it was still in existence between 1932 and 1935. We dismantled it in 1937.

Q. 134. Now what pressure is your gas delivered at what you are pleased to call gateway delivery—City Gate, I believe you call it?

A. Well, of course there is a great variation. Our contract with the Memphis Power and Light Company requires us to deliver gas to them at the City Gates of Memphis at a pressure never less than one hundred pounds, and that we do. The pressure at the delivery points at the City gates through Mississippi are made at whatever pressure may exist in the lines from time to time. And of course it is always about one hundred pounds. The minimum pressure, of course, is at the Memphis end of the line.

Q. 135. At what pressure is it delivered to the City gates in your lines? What pressure is it there before it goes into the gate pipes?

A. Always above one hundred pounds. But varying each day. If I can explain that this way—the withdrawal of gas, of course varies greatly from hour to hour. It is at a minimum between twelve midnight and five o'clock in the morning. Then it increases greatly, and decreases, and increases again. It would be physically impossible for [fol. 107] us to regulate the input to agree exactly with the withdrawal of gas, and since you cannot do that, the result is a fluctuation of pressure.

Q. 136. Well, take the peak load when you deliver it down here into the gate; not to exceed one hundred pounds pressure?

A. Not to be less than one hundred pounds.

Q. 137. Well, don't you have to speed up your pressure during the time when there is a top withdrawal?

A. Of course.

Q. 138. In order to keep the gas there?

A. Of course, and we do that.

Q. 139. Then about what would be the average pressure that you would have at these City gates at the time of the peak load? That is, in your pipe lines?

A. Oh, during the winter-time we try to keep a pressure against the high pressure side of the regulator of not less than one hundred thirty five pounds.

Q. 140. Don't it often run far above that?

A. During the lighter delivery?

Q. 141. At any time?

A. It sometimes does, yes sir.

Q. 142. Well, do you deliver it then into the pipe lines of what you call the distributing company at the same pressure that you have in your pipe lines at any particular time?

A. No. It passes through a regulator from our line into theirs.

[fol. 108] Q. 143. And that is right at the point where the pipe lines converge, I assume?

A. That is where the gas changes hands.

Q. 144. Then you do not deliver the gas to the so-called distributors at the same pressure that you have on the gas at the point of delivery?

A. We do not.

Q. 145. And you alter and change that pressure by some mechanicism that you have there at the intersection of those pipe lines?

A. It would be absolutely impossible to do it otherwise. If we delivered gas at the same pressure which——

Q. 146. (Interrupting) Mr. Wallace, I didn't ask you an engineer's opinion. I asked you the facts, how you do it?

A. Well, I have already answered it.

Mr. Armstrong: You must answer his question, then you have the right to explain your answer.

(The question was read, on request of the witness.)

Mr. Armstrong: Answer his question directly, and then if you want to explain about it, do it.

The Witness: I answered it, we do not. And if we delivered our gas at the same pressure which they hold in their distribution systems, we would have a continuous flow from main line right into the City system, and that, obviously would be an impossible condition.

Q. 147. In the very nature of the product there necessarily [fol. 109] must be some mechanical operation affecting the gas after you get it into Tennessee and before you deliver it to the distributors?

A. Pressure regulation, yes sir.

Q. 148. Now that is done different ways by different gas companies, is it not? That is, some companies take it from one State to another and put it in storage tanks, or in wells, and take it out of there; others do it in the pipe lines that they bring it into the State, is that correct?

A. The only case I know of storage in the ground is occasioned by the fact that a certain gas company was compelled to take gas in which they had no place to put. And they had to put it somewhere, so they put it in the ground. That is the only case of that kind that I know of. Not in large scale.

Q. 149. And instead of using tanks or wells to store the gas to alter its pressure you use your pipe lines for that purpose?

A. We don't use our pipe lines for storage, no sir. We use them for transportation we have no holders.

Q. 150. Well, the pipe line is a holder, isn't it?

A. It contains gas. In that sense it is a holder, yes.

Q. 151. It is holding the gas there at a much higher pressure than it is delivered to your customer?

A. Well, that is due to the inherent——

Q. 152. (Interrupting) First answer my question, then [fol. 110] you can make the explanation?

A. Would you repeat it?

(The question was read by the reporter.)

A. The gas in the pipe line is at a much higher pressure than it is in the lines of the customer, yes.

Q. 153. Where is the gasoline taken out of this gas?

A. This particular gas at this time is not stripped.

Q. 154. Does it go to the consumer at Memphis in the same condition it comes out of the ground?

A. Yes sir, except for the removal of dust, water, dirt. The gas itself does not contain sufficient gasolene, Mr. Pope, to make it profitable to extract.

Q. 155. So you just deliver it with the gasoline in it?

A. Whatever gasoline is in it goes to the customer, yes. It is dry gas.

Q. 156. Now you said in answer to a question of Mr. Armstrong's as I understood you, that you were Chief Engineer of the controlling company. Who is the controlling company?

A. Commonwealth Gas Corporation.

Q. 157. Controlling what?

A. Commonwealth Gas Corporation owns approximately forty-eight or forty-nine per cent of the stock of Memphis Natural Gas Company.

Q. 158. Does that forty-eight to forty-nine per cent represent stock actually issued and outstanding, or authorized stock?

[fol. 111] A. No, it is issued and outstanding in the hands of Commonwealth Gas Corporation.

Q. 159. Well, all of the authorized stock of the Memphis Natural Gas Company has not been issued, has it?

A. My impression is that it has, but I am not sure.

Q. 160. Can you say whether that forty-eight to forty-nine per cent of the stock actually outstanding, is that all the stock outstanding plus the authorized stock unissued?

A. No, it is approximately forty-eight to forty-nine per cent of the outstanding stock.

Q. 161. Who owns the balance of it?

A. The public, principally. There is one block of stock owned by one of the companies controlled by Electric Bond and Share Company, I believe.

Q. 162. Well, we will come back to that later. We got kind of side-tracked a little, for the present. You stated that the chief business of the Memphis Natural Gas Company was the transportation of natural gas. Do you accept gas to be transported for any other customer except its own?

A. We do not.

Q. 163. Well, they don't transport it just for the fun of transporting it, do they?

A. It is getting to be that.

Q. 164. Well, at least that is not their motive, is it, Mr. Wallace?

[fol. 112] A. No sir.

Q. 165. Their motive is what?

A. Is to make a profit on the transportation.

Q. 166. That is, sell the gas to somebody?

A. Sell the gas at a sufficient price to pay them for the trouble, yes.

Q. 167. Then the complainant in this case—we will always refer to the Memphis Natural Gas Company as the complainant, it will be a little shorter, so you can understand it—is in no sense of the word a transporter of gas except

as incidental to its sale of that gas? That is the ultimate purpose, to sell it, and get something out of it, isn't it?

A. It's business is purchasing gas in the field and transporting to a market and selling it there, yes.

Q. 168. Well, the chief purpose is to sell it and make a profit on it?

A. Obviously they have to sell it for more than they pay for it, or there is no profit.

Q. 169. In other words, when you go to the store to buy a suit of clothes you transport it back home, but the chief purpose is not transporting it, but to wear it after you get it there, isn't it?

A. That is correct.

Q. 170. And that applies in this case, of course?

A. Well, I would not say so. I would not agree to that.

[fol. 113] Q. 171. You would not say so, or would? I did not catch it.

A. No, I don't agree with it.

Q. 172. You stated that this complainant buys all of its gas from one concern?

A. Yes sir.

Q. 173. What is that concern?

A. The contract was originally made with the Industrial Gas Company, which is now the United Gas Corporation.

Q. 174. Was that a successor to the concern that you originally bought it from?

A. Yes sir.

Q. 175. What concern is the controlling factor in that corporation?

A. I don't know. I think I know, but I cannot testify to it.

Q. 176. Well, would you object to giving us your best information?

A. It is a company in the Electric Bond and Share group.

Q. 177. One of its subsidiaries?

A. Yes sir, I believe.

Q. 178. You have a written contract, I take it?

A. Oh yes.

Q. 179. Do you have access to it?

A. To the contract?

Q. 180. Yes.

A. Yes sir.

Q. 181. Would you file it as an exhibit to your deposition?

[fol. 114] A. I haven't a copy of the contract with me, but I think there is one available.

Q. 182. Do you have any objection to filing it?

A. Can I consult Mr. Armstrong on that?

Mr. Armstrong: Go ahead and file it, yes, you may produce it subject to objection.

The Witness: I have no objection to it.

Q. 183. Well then, will you please file it?

Mr. McEachern: We will get the contract, Mr. Pope.

Mr. Armstrong: He is just asking you to produce it in future and file it. Just tell him you will.

A. We will produce one for you. (*Exhibit X.*)

Q. 184. When was that contract made, if you remember?

A. It was made in the year 1928.

Q. 185. When, with reference to the contract that was made between the complainant and the Memphis Power and Light Company?

A. At about the same time.

Q. 186. The same date?

A. I would have to consult the contracts. I am sure they are not exactly the same dates, no.

Q. 187. Were you present during the negotiations between the different representatives of these corporations?

A. I was not.

Q. 188. Did you know who was?

A. No sir, I do not.

[fol. 115] Q. 189. And you could not name any that were present and took part in the negotiations?

A. I cannot be certain of it, no.

Q. 190. Who would be the natural man, or more, to handle that for the complainant?

A. At the time those contracts were made the whole project was in a promotional stage, and Mr. Johnson, I think, is familiar with that, the President of the company; he can give you that information.

Q. 191. Now where is the main intersection of the complainant's pipe lines and the Memphis Power and Light Company's lines, where this gas is delivered to them for the use of Memphis, where is it located?

A. It is located on Brooks Avenue, approximately at the City Limits of Memphis.

Q. 192. In the State of Tennessee?

A. Yes, sir.

Q. 193. How many other places are there in Shelby County where there are other intersections with pipe lines that come into your line?

A. They are not intersections. They are delivery points where their lines come into a similar regulator station, and there are ten of them.

Q. 194. Could you name them?

A. Yes, sir. Whitehaven, Capelville, Nonconnah, Holly [fol. 116] Ford Road, Oakville, Collierville, Whitten Road, Bartlett, and Bolton.

Mr. Armstrong: I will call Mr. Pope's attention and the witness both, that you are asking in the present tense, and he is answering in the present tense.

The Witness: I was just going to say that the dates when deliveries commenced at those various points, I have not here with me. Some of them, I am sure, have been since 1935. I do know that.

Q. 195. Who would know when they were actually constructed and the gas began to be delivered?

A. I can check it from the company records.

Q. 196. Will you do that and give us the exact dates of each one?

A. Yes.

Mr. Armstrong: Mr. Pope, in order to facilitate matters, and in answer to your question, why not let him make a memorandum and show that as an exhibit to his deposition.

Mr. Pope: Yes.

Q. 197. When you have acquired this information and reduced it to writing will you please file it as Exhibit C to this, your testimony?

A. Yes, sir.

The said document was accordingly furnished, and marked, for identification, Exhibit C to the deposition of Henry C. Wallace, and the same is hereto attached and made a part hereof.

[fol. 117] Q. 198. Now these different customers you have named are all municipalities?

A. Communities, yes. Whether they are incorporated or not in each instance I do not know.

Q. 199. How is this handled as a business transaction between each of these?

A. At each one of these points we have a meter and regulation station and the gas is delivered into the distribution system of the Memphis Power and Light Company. We read the meters regularly and bill them for the gas.

Q. 200. Who owns the pipe lines that intersect your lines at these various places?

A. They do.

By Mr. Armstrong:

Q. 201. Who is "they"?

A. Memphis Power and Light Company..

Q. 202. Do you know that, or are you just surmising?

A. I know it.

Q. 203. Did they own that all the time during the period of 1932, 1933, 1934 and 1935?

A. Yes, sir.

Q. 204. Did this Memphis Power and Light Company construct those lines?

A. They did.

Q. 205. Is there any of that gas that goes out from your lines to any of these various customers which you have men- [fol. 118] tioned that goes directly to any plant of any kind,—consumer?

A. Only in the instance of the Electric Generating Station of the Memphis Power and Light Company. In that case——

Q. 206. (Interrupting): I am now asking you about the ten various customers that you mentioned?

A. No.

Mr. Armstrong: I object to the use of the word "customers". The witness has not in any sense said the numerous places were customers; said the only customer it had was the Memphis Power and Light Company.

Mr. Pope: I reserve the right to call them anything I think they are.

Mr. Armstrong: All right. Just so we understand each other.

Mr. Pope: And I also object to the distinguished attorney telling the witness that there is only one customer.

The Witness: I would like to go back over that if I may?

Mr. Pope: You may make any explanation you care to.

The Witness: I am testifying now from the general knowledge of the situation in Shelby County. I don't know, and I am not familiar with their distribution systems or just where the gas does go, as a matter of fact.

Q. 207. Then if I understand you, you don't know whether any portion of this gas that is delivered to one or more of these eight or ten concerns is thereafter distributed by [fol. 119] them, or whether it goes directly to the consumer from your lines, do you?

A. It goes into the distribution system of the Memphis Power and Light Company at these delivery points, and beyond that I don't know anything about it.

Q. 208. By distribution system you mean it goes into the pipe lines?

A. Into the pipe lines, yes, sir, which is a system of small lateral lines, of course, to reach a large number of consumers.

Q. 209. And to your own knowledge you don't know whether all of that gas that goes into any one or more of these connecting pipe lines goes directly to some one consumer or two consumers or whether it is distributed among a number of them, do you, of your own knowledge?

A. I know that these distribution systems serve these communities. But as to the distribution of gas in the communities I have no knowledge.

Q. 210. Would Mr. Johnson, the President, know about that?

A. I doubt it.

Q. 211. You are the Chief Engineer, aren't you?

A. Yes, sir. It is none of my business.

Q. 212. And at each one of these intersecting pipe lines that you have just mentioned, I take it you have the same mechanical equipment to alter the gas, at least insofar as the pressure is concerned, that you have described as going into the main line of the Memphis Power and Light Company at Brooks Avenue?

[fol. 120] A. That is correct.

Q. 213. Is it delivered into those smaller lines at the same pressure that it is at the other main line of the Memphis Power and Light Company, or at a less pressure?

A. At a less pressure.

Q. 214. Does, or not, each one of those vary as to the pressure it is delivered into their lines, depending upon the amount of gas that is used through that particular line?

A. Yes, it depends on the demands of the distribution system.

Q. 215. And about what would be the pressure on delivery into those lines, on an average, would you say?

A. I don't know.

Q. 216. Isn't that part of your duties to work that out as an engineer?

A. It is a very small detail, and I have never checked up to see what pressure there is on the downstream side the regulator. I am familiar with the pressure in the pipe lines. But the reduction in pressure I have never checked into.

Q. 217. Is the price the same to your company—pardon me for saying your company, I mean the complainant when I say that—for the gas delivered at each and all of those places in Tennessee?

A. Yes, there is one rate structure to the Memphis Power and Light Company. It applies to all their customers, yes, applies to all their gas business.

[fol. 121] Q. 218. To whom does your company bill this gas, the purchase price of this gas?

A. The Memphis Natural Gas Company bills it to the Memphis Power and Light Company.

Q. 219. For all of it?

A. For all of it, monthly.

Q. 220. Irrespective of how it is used?

A. The rate structure is based on the classifications of gas. That is set forth in the contract.

Q. 221. Isn't the gas all the same quality?

A. Yes, sir.

Q. 222. How do you get classes?

A. There is a distinction between the use of gas, the price that we charge for gas for various uses.

Q. 223. That is for domestic use, and industrial use, for instance?

A. Yes, the price schedule is set out in the contract and provides that the Memphis Power and Light Company shall pay us a certain amount for the gas which is distributed and re-sold by them for domestic purposes.

Q. 224. Then the price that the Memphis Power and Light Company pays the complainant company for gas depends upon the purpose for which it is used after it goes into the hands of the Memphis Power and Light Company?

A. That is customary in the gas business.

[fol. 122] Q. 225. I didn't ask you that, Mr. Wallace.

A. That is a fact, yes, sir.

Q. 226. How many classifications, by reason of the different uses?

A. Five classifications.

Q. 227. Will you name them, please sir?

A. Domestic, domestic heating, commercial, commercial heating and industrial.

Q. 228. How is it determined, the amount of gas that you deliver to this Memphis Power and Light Company that is used in each of these classes?

A. By an inspection of the billing records of the Memphis Power and Light Company.

Q. 229. How frequently do you do that?

A. We accept their statements monthly as to the classification of *of* gas, and audit their books annually to see that there has been no error made.

Q. 230. Well, there would be no way at the end of the year, that you could tell how many cubic feet of gas was used by concerns for those different purposes, would there, except by their own books?

A. That is the only way it ever can be determined, is from their individual meter readings. Let me explain; we measure the total volume of gas that goes into the Memphis Power and Light Company's system. We take, accept their individual meter readings as to the classifications, [fol. 123] or the use to which the gas is put by its customers. That is, the customers of the Memphis Power and Light Company.

Q. 231. Well, suppose the aggregate of their five classifications does not equal the amount that you have delivered at the pipe lines, what happens then?

A. Well, as a matter of fact it never does equal it. And that is classed as unaccounted for.

Q. 232. And what becomes of it?

A. They pay for it at a definite rate.

Q. 233. That rate is based upon what, what sort of a classification?

A. The price is the lowest price, and is the same price as the industrial rate, because of its load factor. The difference is caused by leakage in the system of the Memphis Power and Light Company, and the leakage continues at all hours of the day and night, and always is the lowest bracket.

Q. 234. Where are the main offices of the Memphis Natural Gas Company located?

A. Here in Memphis, Tennessee.

Q. 235. What building?

A. In the Sterick Building.

Q. 236. How much office space has the company here in Memphis?

A. I would estimate it at about three hundred fifty to four hundred square feet.

Q. 237. How many rooms?

[fol. 124] A. Eight rooms.

Q. 238. Who is in charge of that office?

A. The President of the company, Mr. B. L. Johnson.

Q. 239. Does he live here?

A. He does.

Q. 240. How many people are employed in the office in Memphis?

A. Approximately twelve people.

Q. 241. That is within the office itself?

A. Yes, sir.

Q. 242. How many others that report to that office?

A. Well, there are only two others that report there with any regularity.

Q. 243. Well, irregularity?

A. Four, in addition to the twelve.

Q. 244. When you are working for this company in your allocation of about thirty-three and one-third per cent of your time you are in and out of that office, are you?

A. Yes, sir. And I may be wrong about the exact number of employees there. But I would not miss it more than one or two.

Q. 245. Where are the bills made out and mailed out or sent out?

A. They are made up in the Memphis Office.

Q. 246. In other words, the company's management is, of course, in Memphis?

A. Correct.

[fol. 125] Q. 247. What percentage of the business of the Memphis Natural Gas Company by way of receipts is done in Tennessee?

A. Well, the gross revenues of the company, I would estimate that 80% of the revenues come from sales of gas to the Memphis Power and Light Company and West Tennessee Power and Light Company.

Q. 248. Is that money collected through the office in Memphis, it is, I assume?

A. Yes, sir.

Q. 249. Deposited in a bank in Memphis?

A. I am not familiar with the bank deposits.

Q. 250. Where is your check for your salary drawn, on what Bank?

A. I am paid not directly by the Memphis Natural Gas Company. As an officer, I draw no salary.

Q. 251. Well, you give one-third of your time to it, you say—don't they pay you anything for it?

A. The Commonwealth Gas Company pays me.

Q. 252. Why do they pay you for working for the complainant herein?

A. Because they are vitally interested in the system. They have a large investment in it.

Q. 253. Well, if you are a stockholder of a company you don't pay out of your pocket part of the expenses and salaries paid by the company, do you—or, rather, due from the company?

A. Well, I am simply giving you the facts. I am paid by [fol. 126] the Commonwealth Gas Corporation, and do not get a salary from the Memphis Natural Gas Company.

Q. 254. What is your official position in Commonwealth?

A. Chief Engineer.

Q. 255. Is that an office provided by the By-Laws, or would it be termed more an employee?

A. No, I am an employee in charge of all the operations of their subsidiary companies.

Q. 256. Well, does the company by which you are employed charge the company, Memphis Natural Gas Company for your services?

A. They do not directly charge them for my services, no.

Q. 257. How do they do it indirectly?

A. They charge them a fee for management.

Q. 258. Oh! How much is that fee?

A. I don't know.

Q. 259. Do you have any information at all about it?

A. It is a sliding scale, based on the gross revenues, a certain percentage of the revenues; and that varies, the percentage decreases as the revenues increase. And just what percentage applies right now, I don't know. I haven't looked it up.

Q. 260. In other words your employer, the Commonwealth

Gas Corporation, charges a management fee to the complainant herein, along as it does a lot of its other subsidiaries engaged in the same business, parts of the same business?

[fol. 127] A. Yes, sir.

Q. 261. Well, does it charge a management fee to the Memphis Power and Light Company?

A. It has nothing to do with the management and does not of course, does not charge them for management. The Commonwealth Gas Corporation has no connection with Memphis Power and Light Company.

Q. 262. Who owns the Memphis Power and Light Company?

A. It, as I understand, is owned by one of the Electric Bond and Share group companies—controlled by them.

Q. 263. Do you know whether they charge a management fee, or not, to the Memphis Power and Light Company?

A. Oh, I have general information on the subject.

Q. 264. Well, I am not asking for detailed information.

A. I don't know how they do it, or what it is, but they do render service, and they do charge them for it.

Q. 265. Now is the Commonwealth Gas system—corporation still in business?

A. Yes, sir.

Q. 266. Under the Laws of what State is it incorporated?

A. It is incorporated in the State of Delaware and qualified in New York State. In all my testimony I have referred to Commonwealth Gas Corporation, rather than Commonwealth Gas System. They are one and the same.

Q. 267. That is, the Commonwealth Gas Corporation owns 100% of the stock of the Commonwealth Gas System In-

[fol. 128] corporated?

A. Yes sir.

Q. 268. But they are separate entities so far as the charters are concerned?

A. They are.

Q. 269. Then, correspondingly, the Commonwealth Gas System Incorporated; which is one hundred per cent owned by the Commonwealth Gas Corporation, has a management contract with the Memphis Natural Gas Company?

A. That is correct. And my testimony is incorrect insofar as I have referred to the Commonwealth Gas Corporation.

Mr. Pope: I just wanted to get it clear. I thought you were a little wrong there.

The Witness: I didn't think it was a material point.

Q. 270. Now from whom, directly does the Memphis Natural Gas Company buy its gas? With what corporation has it a contract of purchase?

A. United Gas Corporation.

Q. 271. United Gas Public Service Company, is it not?

A. Now you may be correct about that. The original contract, as I testified previously, was made with Industrial Gas Company, and I was under the impression that the Industrial Gas Company had—was acquired by the United Gas Company. It might have been United Gas Public Service Company. But your question was——

Q. 272. (Interrupting). To refresh your recollection is it not true that the original contract with the Memphis [fol. 129] Natural Gas Company for the purchase of this gas in the Monroe Field was made with the United Gas Public Service Company, which later merged with the United Gas Corporation?

A. The name in the contract is Industrial Gas Company.

Q. 273. It is?

A. I think so. Unless I am very much mistaken.

Q. 274. Well, are they not the same?

A. Yes sir, we are talking about the same company.

Q. 275. The same thing?

A. Yes sir.

Q. 276. Now who owns the Commonwealth Gas Corporation?

A. Do you mean who owns the voting stock of the Commonwealth Company?

Q. 277. Yes sir, who owns the stock?

A. The public.

Q. 278. All of it?

A. All of it.

Q. 279. None of these corporations you have mentioned, and no other corporation owns any of it?

A. Not to my knowledge.

Q. 280. What control does any other corporation have over it?

A. None.

Q. 281. Have any management contracts?

A. Any of these companies, a management contract?

[fol. 130] Q. 282. Yes, or any others?

A. With the Commonwealth Gas Corporation?

Mr. Pope: Yes?
The Witness: No sir.

Q. 283. It is the daddy of all of them?
A. It is an independent company. It is not affiliated in any way with United Gas Corporation.
Q. 284. Well, don't they have some relation to Electric Bond & Share?
A. No sir.
Q. 285. What about the United Fuel Gas Company, what does it own?
A. United Fuel Gas Company?

Mr. Pope: Yes sir?

A. The only United Fuel Gas Company I am familiar with is the Columbia Gas and Electric subsidiary in the State of Ohio. I never heard the name before.
Q. 286. Now getting back to the management contract that we were discussing a few minutes ago, will you file that contract, a copy of it, as Exhibit D to your deposition?
A. I will. Just a minute; I doubt if we have one here.

Mr. Armstrong: You can say, if you are doubtful whether you have one, you can say you will if you can get one.
The Witness: I am doubtful whether there is one here, Mr. Pope.

[fol. 131] Q. 287. Well, the mails will bring it in from anywhere else. You don't mean to say the Memphis Natural Gas Company would have a contract of purchase of all its supply of gas and not have a copy of the contract?
A. I think there is a management contract in existence, yes sir. Can I consult Mr. Armstrong on that?

Mr. Pope: Yes sir.
The Witness: Do you have any objection?
Mr. Armstrong: No, it is all right, subject to objection. Is that a public document? I mean, has it been given out, or is it a private contract between the Commonwealth and the Memphis Natural Gas?

A. It is an assignment of the old management contract with the Appalachian Gas Corporation.

Mr. Armstrong: I reserve an objection to that. I have no objection to you seeing it, except if it has not been made

public, just a private contract between the two parties, I might not want to file that. The record may show that.

Q. 288. Now the United Gas Public Service Company, which you think has been probably merged into United Gas Corporation is controlled by Electric Bond and Share Company, isn't it?

A. I believe so. I have no accurate knowledge of the corporate structure of the Electric Bond and Share Company. I am not in position to testify about it.

Q. 289. What company, if any, does the construction work of the Memphis Natural Gas Company?

[fol. 132] A. The Memphis Natural Gas Company.

Q. 290. Does it not have a service contract with any other company?

A. It does not.

Q. 291. You are familiar with the Ebasco Service Company?

A. I know there is such a corporation.

Q. 292. Well, is there not and was there not in 1932, 1933, 1934 and 1935, or any part of that time, a construction contract in existence between Ebasco Service Company and the Memphis Natural Gas Company?

A. If there was I never heard of it.

Q. 293. Was there one between the Ebasco and the United Gas Public Service Company?

A. I would have no knowledge about that.

Q. 294. Does the Columbia Engineering Company do work for the Complainant herein?

A. No sir.

Q. 295. Any sort of engineering work or construction work?

A. No sir.

Q. 296. Are you familiar with the National Power and Light Company?

A. Only by name.

Q. 297. That is one of the Electric Bond and Share Company's affiliates?

[fol. 133] A. So I understand.

Q. 298. Do you know, as a matter of fact, that the National Power and Light Company owns 99 and nine tenths per cent of the Memphis Power and Light Company's stock?

A. I don't know the percentage that they owned in it.

Q. 299. You did know they owned a large percentage of it?

A. I was under that impression.

Q. 300. They control it, don't they?

A. I knew one of the companies of the Electric Bond & Share group controlled the Memphis Power and Light Company. Which one I did not know.

Q. 301. Also the West Tennessee Power and Light Company?

A. Yes sir.

Q. 302. As a matter of fact that is 100%, isn't it?

A. I don't know.

Q. 303. The Commonwealth Gas Corporation, that is your employer?

A. Yes sir.

Q. 304. They own and control the West Virginia Gas Corporation?

A. They do.

Q. 305. Does West Virginia Gas Corporation hold the note, or did hold one during the period of time covered by this litigation, for $470,000.00 against the Memphis Natural Gas Company?

A. You are asking me questions now that are outside the scope of my work in connection with it.

Q. 306. You know some things that are outside the scope [fol. 134] of your work, don't you?

A. But I am not on the Memphis Natural Gas Company Board of Directors.

Q. 307. Are you on any of these directory boards?

A. On some. Commonwealth Gas Corporation. In fact I am a director of West Virginia Gas Corporation now, Mr. Pope; I was not at that time.

Q. 308. How long have you been on?

A. Oh, a matter of months.

Q. 309. But you were familiar, were you not, with the business of that company, West Virginia?

A. Yes sir.

Mr. Armstrong: For my own information I would like to have the question read that you asked back up there.

(The question was read by the reporter as follows:)

"(Q. 305) Does West Virginia Gas Corporation hold the note, or did hold one during the period of time covered by

this litigation for $470,000.00 against the Memphis Natural Gas Company?"

The Witness: I have never known of the West Virginia Gas Corporation holding the Memphis Natural Company's note.

Q. 310. Does the Memphis Natural Gas Company hold a note of $470,000.00 against the West Virginia Gas Corporation?

A. At the present time?

Q. 311. From 1932 to 1935 inclusive?

A. I think not. But I don't know; those were financial [fol. 135] transactions with which I had no connection, and any transactions between those two companies I cannot testify about them.

Q. 312. Well now, from January 1st 1932 to December 31st 1935 did either the Memphis Natural Gas Company or the West Virginia Gas Corporation hold a note, one against the other, for any amount?

A. There have been inter-company transactions between those two companies, yes, sir. But as to the details of them, and amounts, I cannot testify, unless I get the financial statement out and study it.

Q. 313. Who controls the Monroe Consolidated Gas Company?

A. The Commonwealth Gas Corporation.

Q. 314. Do you know what percentage of stock it owns?

A. One hundred per cent.

Q. 315. Is that the company that produces the gas in the field?

A. It is not.

Q. 316. What company is that?

A. United Gas Corporation produces the gas which the Memphis Natural Gas Company purchases.

Q. 317. Name all of the companies and corporations that have anything to do whatever, construction, financial aid, management, or any other way, with the gas, beginning at the time it is taken from the earth and delivered into Memphis?

A. The gas is delivered to the Guthrie Station of Memphis Natural Gas Company by the United Gas Corporation, [fol. 136] Hope Producing Company, Interstate Natural Gas Company, United Carbon Company, and Southern Carbon Company. If you go back of that you will find that

those companies produce part of the gas, and part of the gas, of course, they purchase in that gas field. It would be impossible to trace it that far back.

Q. 318. Well now, you have it delivered at Guthrie. Now what companies from there on?

A. None.

Q. 319. Well, the Commonwealth Gas Corporation figures in it don't they?

A. Well, I was evidently not following you. I thought you were concerned with the production of gas.

Q. 320. I said, any connection, any service, financial, construction, management, or anything else?

A. Well, other than that there is simply Commonwealth Gas Corporation through its management contract which is held by Commonwealth Gas System Incorporated. That is all.

Q. 321. Now who controls the Hope Producing Corporation?

A. The Standard Oil Company of New Jersey.

Q. 322. They produce it, drill for it, is that what you mean?

A. Yes, sir.

Q. 323. Who controls Interstate?

A. That also is a Standard Oil Company subsidiary.

Q. 324. What about the United Carbon?

A. United Carbon Company have no affiliations with other corporations.

[fol. 137] Q. 325. What is the other company?

A. Southern Carbon Company. I don't know who controls the Southern Carbon Company. Those companies are the big producers of gas in the Monroe field.

Q. 326. And the gas is bought from them at the point that it is taken from the ground?

A. No. They transport it from the point where it is produced from the well.

Q. 327. To the Guthrie Station?

A. To the Guthrie Station, yes sir.

Q. 328. And it is there bought?

A. And it is there bought, yes sir.

Q. 329. By your company?

A. Right.

Q. 330. Now from that time on, after it is delivered at Guthrie into the Memphis Natural Gas Company's pipe line, name the companies that have anything whatever to

do with, or profit by the handling of that gas to the consumer?

A. To the consumer?

Q. 331. Yes sir, clear through?

A. To the ultimate consumer?

Q. 332. That is right. There could not be but one consumer, I don't reckon.

A. The gas which we purchase there at Guthrie is delivered in the State of Louisiana to the Louisiana Power [fol. 138] and Light Company, and by them through their own line to the ultimate consumer. In the State of Arkansas we sell our gas to the Arkansas Power and Light Company and they distribute it to the ultimate consumer.

Q. 333. Who owns it, controls it?

A. The Arkansas Power and Light Company?

Q. 334. Yes sir.

A. I don't know.

Q. 335. Has the Commonwealth Gas Corporation got any control over it?

A. No, none. No connection.

Q. 336. That is a small company?

A. I think it is a pretty good sized corporation.

Q. 337. What I am talking about, so far as it consumes your product?

A. Yes, it is a small purchaser. In the State of Mississippi we sell our gas to the Mississippi Power and Light Company and they distribute it, as far as I know, to the ultimate consumer. In the State of Tennessee we sell our gas to the Memphis Power and Light Company and the West Tennessee Power and Light Company, who do the same thing.

Q. 338. Well now, what I asked you, Mr. Wallace, was to name all other companies that have anything whatever to do with the financial and profit-sharing, losses or anything else, that figure in it?

[fol. 139] A. Well, that, of course, I can't do.

Q. 339. What is the reason you can't? So many of them you just can't remember them, is that it?

A. No. What the Mississippi Power and Light Company does——

Q. 340 (Interrupting): I am asking about the gas that comes to Tennessee.

A. I have given you right now the extent of my knowledge of this gas and where it goes. Now who profits by it I don't

know. After we get through with it, after we make our delivery of the gas, we are not interested in it.

Q. 341. Are you certain about that?

A. We have no control over it.

Q. 342. You said you had no interest in it——?

A. Well, we have an interest in the progress of the business, of course.

Q. 343. And the profits?

A. The profit that the purchaser makes?

Q. 344. The profit which is realized from the consumption of this gas sale to the consumer?

A. We have an interest in it only insofar as our rate schedule provides that we are to be paid, yes. That is all.

Q. 345. Well, that is a very material interest, isn't it?

Mr. Armstrong: I would like to note an objection to that line of questioning on the ground that the contracts themselves are the best evidence of what they contain and the [fol. 140] obligations of the parties.

Mr. Pope: And the defendant has been trying for several months to get access to these contracts and up to this time have failed.

Mr. Armstrong: Well, today is the appointed time. You will have them.

Mr. Pope: Always. But we are performing——?

Mr. Armstrong: I think you were notified when we began taking the depositions they would be produced.

Mr. Pope: I haven't got it in cross examination of this witness yet.

Mr. Armstrong: I am willing for you to recall him, if you want to.

Q. 346. Now Mr. Wallace, you have testified that you were an employee of the Commonwealth Gas Corporation?

A. Yes, sir.

Q. 347. Vice-President of the Memphis Natural Gas Company?

A. Yes, sir.

Q. 348. And a director in the West Virginia Gas Corporation at this time?

A. At this time.

Q. 349. Now have you any official connection or status as an employee of any other corporation engaged in this kind of business?

A. I am an officer in some of the other subsidiary com-
[fol. 141] panies of Commonwealth Gas Corporation, yes, sir.

Q. 350. Will you name them, please?

A. The difficulty there, Mr. Pope, is the numerous small operating companies in West Virginia.

Q. 351. You don't mean to say there is so many you can't name them?

A. Well, I might omit one.

Q. 352. Well, we will excuse you, if you should.

A. The West Virginia Corporation, I am on the Board of Directors, and I am a vice president; I am a vice president in the Carbons Consolidated Incorporated, and of Memphis Natural Gas Company. And that is all. I am also a member of the Board of Directors of Cumberland Gas Corporation and a vice president of its two subsidiaries, Blue Ridge Gas Company and Upham Gas Company. However, that corporation has no connection with Commonwealth Gas Corporation. It formerly did.

Q. 353. Does not happen to be in its territory?

A. Sir?

Q. 354. Does not happen to be in its territory?

A. That is true.

Q. 355. They have ceded that territory to some other company?

A. No, they have disposed of their interest. I am also a member of the Board of Directors of Consolidated Gas Utilities Corporation. That is all.

Q. 356. Are any of these corporations that you have just
[fol. 142] mentioned with which you are officially connected, under the control or management or any other connection whatever with the Electric Bond and Share Company?

A. None of them have any connection at all with the Electric Bond and Share Company, unless you consider the stock ownership in Memphis Natural Gas Company by National Power and Light Company a connection.

Q. 357. Well, that is a direct connection, is it not? In other words the National Power and Light Company owns the controlling stock interest in the Memphis Power and Light Company, and the National Power and Light Company is controlled by the Electric Bond and Share Company? That is correct, isn't it?

A. Well, I only know what you are telling me about it at this time.

Q. 358. You mean, you are an officer in the company and don't know that Electric Bond and Share Company has this control over it?

A. You said to me——

Mr. Armstrong: You asked him about the Memphis Power and Light Company. You may have thought you said Memphis Natural Gas, but you didn't.

The Witness: No, he said Memphis Power and Light, that they owned 99½%.

Mr. Pope: That is what I am asking about. I am conscious of what I asked him. The only error I made, you [fol. 143] thought I meant he was vice president of that company.

The Witness: Yes.

Mr. Pope: That is not what I meant.

The Witness: The first time I have ever known of the percentage of stock owned by that company in the Memphis Power and Light Company is when you told me today.

Q. 359. You know they control it, don't you Mr. Wallace?

A. I have been given that impression, yes. I just assumed it.

Q. 360. Now the Commonwealth Gas Corporation, which pays your salary if I understand you——?

A. Yes, sir.

Q. 361. (Continuing:) Is not engaged in any kind of business except Natural Gas business, is it?

A. Some oil. To a slight extent in the oil business.

Q. 362. Producer and buyer of crude oil?

A. Producer. They are also engaged in the liquid gas business.

Q. 363. Well, which one of these companies we have been talking about, the Commonwealth Gas Corporation, the Memphis Natural Gas Company—with reference to those two, which one was incorporated first?

A. Commonwealth Gas Company is the successor through reorganization, to the Appalachian Gas Corporation. Memphis Natural Gas Company was organized before Commonwealth Gas Corporation.

Q. 364. But its successor was organized long before the [fol. 144] Memphis Natural Gas Company—I mean its predecessor?

A. I don't know.

Q. 365. When was the Commonwealth Gas Corporation incorporated?

A. 1933.

Q. 366. When was the Appalachian Company you spoke of incorporated?

A. That I don't know.

Q. 367. Was it an old company?

A. No, sir. Just approximately 1928.

Q. 368. Will you procure and file a copy of the charter of the Commonwealth Gas Corporation, and also of Appalachian Gas Corporation, which was the predecessor you said of the Commonwealth Company?

A. I will use my best efforts to obtain one. I am not at all sure I can get one. (Exhibit E)

Q. 369. You have testified that the Commonwealth Gas Corporation charges the Memphis Natural Gas Company a management fee?

A. That is right.

Q. 370. I believe you said you didn't know how much that was?

A. I would have to look it up to give you an accurate answer, because it varies from year to year as I explained.

Q. 371. Do you know what it was in any year?

A. During the year 1937 it was—no, I don't know.

Q. 372. Does the Commonwealth Gas Corporation charge a management fee of any of these other corporations that you have been talking about?

[fol. 145] A. Yes, sir.

Q. 373. Which one?

A. They charge a management fee to Carbons Consolidated Incorporated. They at one time charged a management fee to the West Virginia Gas Corporation, but whether or not that is still in effect I don't know.

Q. 374. Do they charge the Memphis Power and Light Company or the West Tennessee Power and Light Company any fee?

A. We did not render them any service, and we do not charge them a fee.

Q. 375. It is not always based on much service, is it? Does Memphis Natural Gas Company charge the Memphis Power and Light Company any fee, management fee?

A. No sir. They render them no service for which they could charge.

Q. 376. Do they charge the West Tennessee Power and Light Company any fee?

A. No sir.

Q. 377. Does any corporation charge either of them a management fee?

A. Does any corporation charge either Memphis Power and Light Company——?

Q. 378. Or the West Tennessee Power and Light Company?

A. I have no knowledge on that subject.

Q. 379. Does any corporation or individual or partner-[fol. 146] ship charge any management fee of the Memphis Natural Gas Company except the Commonwealth Gas Corporation?

A. No sir, except fees in the ordinary course of business for any assistance we might have to get from outside our own organization; legal fees, and fees of that nature. There is no fee under contract, if that is what you mean——?

Mr. Pope: Yes?

A. No.

Q. 380. Why don't they employ their own lawyers, and employ their own experts, and so forth? Why does some other corporation have to do it?

A. They do employ their own.

Q. 381. Well, you said that some other corporation, other corporations, charged fees, if I understood you, lawyer fees and outside work, and so forth, and special work?

A. I had in mind when I was studying about that, Mr. Pope, small fees for consultation that we might have to get. But none under contract. For example, we have a consulting engineer we pay one hundred dollars a month to for occasional consultation on a very highly specialized branch of work.

Q. 382. Whose employee is he?

A. Memphis Natural Gas Company.

Q. 383. That is, the Memphis Natural Gas Company pays him one hundred dollars a month?

A. Yes sir.

[fol. 147] Q. 384. Does that go to him, or some corporation?

A. It goes to him.

Q. 385. Is he connected with these other corporations?

A. No sir.

Q. 386. Well then, you got in a field I did not ask you about. I asked you about any of these other corporations other than the Commonwealth Gas Company charging the Memphis Natural Gas Company any management fees of any kind?

A. I could have answered no.

Q. 387. Do you have any connection whatever with the Electric Bond and Share Company?

A. I have not, and never have had.

Q. 388. Don't you, in handling the affairs of the Memphis Natural Gas Company, have any controversies that may arise between Memphis Natural Gas Company and the Memphis Power and Light Company or the West Tennessee Power and Light Company, would you not necessarily have to take it up with National Power and Light Company?

A. We never do.

Q. 389. You worked that out with the individual representing those companies?

A. Yes sir.

Q. 390. Are you any relation to William T. Wallace?

A. No sir.

Q. 391. Do you know him?

[fol. 1[illegible]] A. Never heard of him.

Q. 392. You don't know that he is connected with the National Power and Light Company?

A. I do not know it.

Q. 393. Are you acquainted with Mr. Harry A. Wallace?

A. Well, I know him.

Q. 394. Are you related to him?

A. No, I have no relatives by the name of Wallace living.

Q. 395. You are not kin to the secretary?

A. No.

Q. 396. What is the value of the property owned by the Memphis Natural Gas Company inside the State of Tennessee?

A. I am sorry I cannot answer that. I can, with a little time to work on it, make up such a valuation.

Q. 397. Do you know the assessed value?

A. No sir, I do not.

Mr. Armstrong: I will say, Mr. Pope, for your information, we are going to put in the ad valorem assessment for the years 1932 to 1935.

Mr. Pope: All right.

Q. 398. Is the price for which your company, the complainant herein, sells it- product to the Memphis Power and Light Company and the West Tennessee Power and Light Company, based upon the heat unit qualities of the gas?

A. The price is per cubic foot, and there is a clause in [fol. 149] the contract requiring us to deliver gas with a calorific value within definite limits.

Q. 399. What would happen if it fell under that, the quality of gas you deliver?

A. I am not sure whether the contract provides that the price will be decreased in proportion, or not. But if it falls under that, of course there would have to be some adjustment made.

Q. 400. How many contracts has the complainant herein with the Memphis Power and Light Company?

A. Two.

Q. 401. Have they ever been changed, amended?

A. No.

Q. 402. One is what you would term sales for distribution, and the other is for consumption.

A. Yes sir.

Q. 403. What percentage of the gas that is delivered to the Memphis Power and Light Company is for consumption by that company?

A. Consumption by the company itself?

Mr. Pope: Yes sir?

A. Approximately one third. Approximately—let me correct that—approximately one fourth.

Q. 404. Of the amount of gas delivered to the Memphis Power and Light Company, or the amount that is delivered in the State of Tennessee?

[fol. 150] A. Delivered to the Memphis Power and Light Company. It is nearer one third.

Q. 405. Where does Memphis Power and Light Company consume this gas?

A. They consume it in their electric generating plant for boiler fuel.

Q. 406. That is the only place?

A. That is the only place that I know of.

Q. 407. Where does that gas come from? How does it get to the consuming plant?

A. They have their own pipe line, lateral line running off of their twenty-two inch lines into which we deliver, which transports the gas to that plant.

Q. 408. Is there a meter there?

A. At the pipe line?

Mr. Pope: Yes?

A. Yes sir.

Q. 409. At the point where this goes off—this pipe?

A. No sir.

Q. 410. It is at the power plant?

A. Yes sir.

Q. 411. And they pay you in accordance with the reading of that meter?

A. That is correct.

Q. 412. In other words the amount of gas that is con- [fol. 151] sumed by that company is the basis of the settlement between you and the company for the class of gas furnished—sold?

A. That is correct.

Q. 413. And that, I take it, is less that what you sell them gas to sell to the folks in Memphis?

A. It is tied in to the price of coal, so that price fluctuates. It always has been less.

Q. 414. Always has been what?

A. Less than the other classifications of gas, yes sir.

Q. 415. How does that compare with the classification which you said was one of the five classes that the Memphis Power and Light Company furnishes to their industries?

A. Practically the same. This past year it was slightly lower, due to the fact that it is based on the equivalent price of the lowest priced fuel available, which brought it down slightly lower.

Q. 416. In other words your company—that is, the complainant company—sells this gas to the Memphis Power and Light Company for consumption in its own plant at a lower figure than it gets paid for gas delivered to the Memphis Power and Light Company that is delivered to private industrial plants in the territory?

A. That is true, and the reason for that is the nature of the gas load itself.

Q. 417. I thought you said it was based on the price of coal?

A. The reason it can be tied in to the price of coal, and [fol. 152] based that way, is because of the fact that it is a uniform load.

Q. 418. Well, isn't the industrial plants, a large per cent of them uniform?

A. No sir, they are not. They are much more uniform, of course, than the domestic loads, but as compared to a large electric generating station, they are not nearly as uniform.

Q. 419. Do you know the reason why there was two contracts made with the Memphis Power and Light Company, why it was not all incorporated in the same contract?

A. No sir, I don't. It would be my opinion, though, that it was simply because of the nature, technical nature of the load itself would require a good many covering clauses.

Q. 420. Well, it could have been done in the same contract just as easy, could it not?

A. I don't know the reason.

Q. 421. Has the Memphis Power and Light Company made money out of its purchase and sale of this gas and distribution,—reasonable returns on its investment?

A. I think it has not.

Q. 422. Has there been any deficits during the years we have under consideration?

A. I have not followed their financial statements and don't know.

Q. 423. Has there been, so far as you know, any adjustments between the complainant company and the Memphis Power and Light Company, of profits or deficits during those four years covered?

[fol. 153] A. Yes, there has been. But those adjustments are not based on the financial statements. They are based on a formula.

Q. 424. Well, I take it the result of the business had something to do with it, didn't it?

A. It has an effect on it, yes, but it might be possible for them to have made adjustments with us without having made a profit themselves.

Q. 425. That is, if there was a loss?

A. Sir?

Q. 426. That is, if there was a loss there would still have to be an adjustment?

A. There is always an adjustment, yes.

Q. 427. I am not talking about an adjustment so far as

any dispute about the amount of gas delivered is concerned. I am talking about the adjustment of the result of the business itself, distributing and selling gas?

A. The only point I am trying to get over to you is that the adjustment that is made is not based on the return as the financial statement would show it. It is based on a formula which provides for certain deductions, regardless of what the year may have been. In other words it is simply a yardstick.

Q. 428. You didn't borrow your yardstick from the TVA, did you? Who made the yardstick?

A. Well, that basis was arrived at when the contract was [fol. 154] made. I don't know who made it.

Q. 429. Doesn't the contract provide that there shall be adjustments on profits, if any made, or on losses if any are suffered?

A. Yes; to understand that, though, you have to understand the reason back of it. When this project was first contemplated there was a large amount of pipe line construction for transportation of natural gas going on all over the Country. And gas was being brought into towns that had formerly been using manufactured gas. The experience of manufacturing gas companies was that they suffered a great loss when they introduced natural gas into a town they had been formerly serving with manufactured gas. The public had to be educated to its use. The public got a great deal more for its money and it was necessary for them to build up a much larger load before they could hope to make any profit. This contractual division was for the purpose to prevent the transportation company from making a large profit while the distribution company might suffer, due to the introduction of this new type of fuel, and equalize, more or less, their earnings, so that one would not profit by the other's loss. It was a hazardous undertaking, and this was introduced for that reason.

Q. 430. To take care of the losses of the distributing company?

A. Not to take care of their losses. Because it did not take care of their losses. But to assist them over those years.

Q. 431. And in case of profit, to assist them in dividing [fol. 155] the profit, too?

A. That might or might not follow.

Q. 432. That was the plan, wasn't it?

A. Yes, but we applied a formula there that carries through, regardless of the volume of business, or anything else. The formula is applied to the current year, so that the distributing company is protected in that way against an exorbitant city gate rate, which they in fact did not know whether it was exorbitant or not at the time. They were new in the business.

Q. 433. In other words the price to the company that brought the gas to the city gate depended upon the result of the distribution in the towns where it was furnished, the community where it was furnished?

A. Naturally if their buyer did not prosper in his business he could not hope to continue in business, and the transportation company of course would suffer.

Q. 434. And the price was fixed in the contract, but later to be changed if conditions were not favorable to the distributing company that it would show a profit—but on the contrary, would show a loss, and correspondingly the city gate price would be reduced?

A. And the city was a party to the contract, which provided that when certain earnings had been made, then the citizens in Memphis, the consumers, were to get the benefit of the profit over and above that.

[fol. 156] Q. 435. Well now, please, get back to my question; the price was fixed in the contract to the complainant company herein for delivering gas to the city gates, but it also provided, and the plan was, that those prices were subject to change, depending upon the result of the business of the distributing company, either up, or down?

A. No, the prices were not subject to change, no sir, until after a certain return had been made by the companies involved.

Q. 436. Suppose the Memphis Power and Light Company had made four per cent on its investment—?

A. Yes sir.

Q. 437. After all the deductions provided for were had. What became of that four per cent?

A. The Memphis Natural Gas Company, in turn, is required to show its return on its investment. Then an adjustment is made between those two figures.

Q. 438. The two companies?

A. That is right.

Q. 439. And each company would participate in that overamount that you have just mentioned?

Mr. Armstrong: We wish to object to this entire line of cross-examination on the ground that the contracts speak for themselves, and this is secondary evidence as to the contracts.

Mr. Pope: I am asking this witness of the system adopted, with which he seems to be thoroughly familiar, which is [fol. 157] nothing more nor less than a construction of what I understand him to say the contract is——

Q. 440. And assuming that the contract does say that, I again ask you if the result of the distribution of this gas by the Memphis Power and Light Company was that it would realize 4% over and above all these deductions we have talked about, and provided for in the contract, what would become of that 4%?

A. I can only answer it this way, that what becomes of the 4% would depend again on the results of the transportation profits.

Q. 441. That is, that depends upon whether the Memphis Natural Gas Company had made money, or not?

A. The four per cent would be at the disposal of the Memphis Power and Light Company, their money. If we had the contract here and could read it, it is thoroughly covered in that clause.

Q. 442. Well, you seem to be thoroughly familiar with it——?

A. Well, it is a very, very intricate clause in the contract, and it is very difficult to discuss it.

Q. 443. Do you mean to say, that you as the Chief Engineer, or General Engineer, or the Vice President, don't even know what this contract means?

A. I am very familiar with it, yes.

Q. 444. Well then, please answer my questions: What would become of that 4%?

A. I will answer it as I did before, what becomes of the 4% would be made a matter of adjudication between the auditors, and would depend upon the results of the trans- [fol. 158] portation company's operations.

Q. 445. Would the Memphis Natural Gas Company have any claim on it?

A. We might. We might, depending upon what the results of our year's operations had been.

Q. 446. Well, suppose that your company had lost money on its transportation that you have just mentioned, then what would become of the four per cent?

A. Then we would have a claim against the Memphis Power and Light Company.

Q. 447. On the contrary now, the other horn of the dilemma, suppose that under the contract the Memphis Power and Light Company would lose four per cent, after all the deductions you have mentioned had been had, what then would be the result, where would the 4% fall?

A. If they had a deficit, according to the formula supplied in the contract, and the Memphis Natural Gas Comany had a profit according to the formula, then they would have a claim against the Memphis Natural Gas Company.

Q. 448. Isn't it true that under Article Six of this contract which has reference to the natural gas that is delivered by the Memphis Natural Gas Company to the Memphis Power and Light Company, and which is sold and distributed by the Memphis Power and Light Company to consumers in Memphis, that the rates to be paid the seller, so [fol. 159] designated by you as the complainant, by the buyer, for the gas delivered to it, are covered and provided for?

A. The rates are covered and provided for I think in Article 6. I think that is the Article.

Q. 449. That is right. Now isn't it also true that the rates so provided are subject to adjustment in accordance with the profits of Article II of the contract?

A. Article II being the contractual division Article, yes, that is true.

Q. 450. And isn't it also true that Article 9 of the contract provides a means or method for computing the seller's net surplus or net deficit for each calendar year?

A. That is correct. But so that my testimony will still be correct, as I said, the adjustment of rates as provided for is downward after both the transportation company and the distribution company have realized a certain return on a certain investment; then the rates are to be adjusted downward to take up any profit over and above the rate of return.

Q. 451. Well, aren't they also to be adjusted downward in case the distributing company does not make any money and cannot afford to pay that price?

A. No, they are not.

Q. 452. Well, it is true that in case——?

A. (Interrupting) They are adjusted by the effects of

that division to a certain extent. That is what I am talking about.

[fol. 160] Q. 453. The effect of it is——?

A. (Interrupting) But the price remains fixed.

Q. 454. But it is made up by the surplus that accumulates in a later year, isn't it?

A. True, for the reason that I set forth in the beginning, to protect them against the hazards in the first few years of a change of that kind.

Q. 455. Now under that understanding of these different sections in this contract, since the execution of the contract in 1928 has either the seller or the buyer, or both, had net deficit, within the meaning of Article 9 and/or 10?

A. Unless I am very much mistaken they have always had a net deficit, Mr. Pope, because the net figure is after allowing them the 6% in the case of Memphis Natural Gas Company on their investment. In other words the Memphis Natural Gas Company has never yet had a return on its investment.

Q. 456. Never paid any dividends?

A. Yes, sir. I mean, a return as provided in the contract of 6%.

Q. 457. Well, suppose that it does have a return this year, for illustration, of two per cent over the six——?

A. Yes sir.

Q. 458. Then under the contract what would become of that two per cent?

A. That is included with the net profit or deficit of Memphis Power and Light Company in the adjustment.

[fol. 161] Q. 459. The adjustment with whom?

A. With the Memphis Power and Light Company.

Q. 460. The Memphis Power and Light Company is the one that has got it. Who would they adjust it with?

A. I thought you said if Memphis Natural Gas Company made the two per cent——?

Mr. Pope: No.

A. In either case the net profit, or the net deficit, is balanced with the net profit or net deficit between the seller and the buyer.

Q. 461. In other words, if the Memphis Power and Light Company should make that two per cent more than that I have just mentioned, then the Memphis Natural Gas Company would participate in that two per cent?

A. Yes.

Q. 462. And vice versa, if the Memphis Natural Gas Company should realize the same results, the Memphis Power and Light Company would participate in that two per cent?

A. If that adjustment is a participation, that is correct.

Q. 463. Well, you call it an adjustment, and I call it a participation. The only difference in the two words is simply men's ideas of how to express the same thought, isn't it?

A. It may be.

Q. 464. In other words, each company would get part of that over—plus profits, if profit existed as I have just mentioned?

[fol. 162] A. To offset their losses; just bear this in mind, that if both of the companies, the seller and the buyer, make a profit over and above that allowed them, then neither one of them get it, the City gets it. It is a three-way proposition.

Q. 465. The City?

A. Yes sir. The City gets it because they are a party to it, and it is required that when the net return over these periods of years is more than, in our case, six per cent on our investment,—I have forgotten the percentage that is allowed the Memphis Power and Light Company, when that return is exceeding those percentages, then the gas rates must be reduced down to take up that excess profit.

Q. 466. Well, what about the results prior to that? You don't reduce it to the City on what you have done up to then—you just do it from that time on?

A. We are permitted a certain return by the City in our agreement with them. To make six per cent on our investment from the inception of the enterprise.

Q. 467. After you have paid all these management fees and other things?

A. Correct. Salaries and pay rolls and rent and taxes.

Q. 468. While it is on my mind, what is the reserve set aside at this time by the Memphis Natural Gas Company for taxes?

A. I would have to consult the financial statement to give you that figure.

[fol. 163] Q. 469. What do the taxes amount to every year that the Company has been paying, not only in Tennessee but in other States?

A. That, again, I would have to procure the figure. It is

an accounting matter, and I don't attempt to know it.

Q. 470. Well, a financial statement would very clearly and very quickly disclose just what that was, wouldn't it?

A. Yes sir, exactly, to the penny.

Q. 471. Will you undertake to get that for me?

A. Yes.

Q. 472. And give it to me this afternoon?

A. Yes sir.

A recess was here taken until one thirty o'clock P. M.

Afternoon Session Nov. 14th, 1938

(Resumed at one thirty o'clock P. M., and the witness further cross examined by Mr. Pope as follows:)

Q. 473. Formerly you were asked in your cross examination about the percentage of business that was done in Tennessee by the complainant, and you could not give it accurately. I now ask you if you have before you a financial statement showing the business, and if so to give the exact percentage for each year?

A. Yes sir. The previous question, however, that was asked me, was what percentage of the volume of gas that came into Memphis was used by the Memphis Power and Light Company itself, as I remember it——?

[fol. 164] Q. 474. Yes, and then I asked you also what percentage of the business as a whole, was done in Tennessee?

A. The annual report for the year 1937 shows the per cent of revenue derived by Memphis Natural Gas Company from its sales to the Memphis Power and Light Company to have been, for

1932, 83.24%
1933, 83.08%
1934, 81.47%
1935, 80.06%.

Q. 475. Now isn't that the percentage of the whole business the complainant company has done in Tennessee by sales to Memphis Power and Light Company, and does not include sales to the West Tennessee Power and Light Company?

A. No sir, it does not include that.

Q. 476. Now give us the percentage that is sold to that company?

A. The percentage sold to that company is not set out in this report.

Q. 477. What per cent would it be, in your judgment, for those years?

A. It is a very small percentage.

Q. 478. That is, for the first year or two, and then increases, does it not?

A. Even at the present time it is still quite small. I would estimate it to be less than 5%.

Q. 479. An average of five for each of the years in question?

[fol.165] A. An average of five. I think that at the present time it is probably just a little over five. In 1932 it probably was not over one or two per cent.

Q. 480. Well, now, I will get you also to give the percentage of business as shown by that report of complainant that was realized from sales to the Memphis Power and Light Company for its consumption at its power plant in Memphis for the years in question?

A. The same annual report gives those figures as follows:

1932, 33.49%.

1933, 33.22%.

1934, 27.78%.

1935, 24.34%.

Q. 481. Now you said on direct examination that you furnished data for reports to the Federal Authorities?

A. Yes sir.

Q. 482. Some Board,—what did you call it?

A. The Federal Power Commission.

Q. 483. Now as a matter of fact that Commission was not created until 1933, was it, Mr. Wallace?

A. Well, the Federal Power Commission was created a good many years ago, but as far as its jurisdiction over Interstate Gas Transportation, that was only made effective this current year.

Q. 484. Then there was none of these in question that were affected, one way or the other?

A. That is true.

[fol. 166] Mr. Pope: That is all.

Redirect examination.

By Mr. Armstrong:

Q. 485. Mr. Wallace, you speak of the compressor station that was constructed once at or near Memphis?

A. Yes sir.

Q. 486. Was that used at all in the years 1932 to 1935, inclusive?

A. It was not.

Q. 487. Has it, or not, since been dismantled?

A. Yes sir, it has been.

Q. 488. Why is it necessary to reduce the pressure of the gas before delivery? In other words, what would happen if you turned it into the Memphis Power and Light Company's pipes at the same pressure it is flowing through your pipes?

A. It would, in the first place, throw a very high pressure into the distribution system.

Q. 489. What effect would that have?

A. It would be hazardous and unsafe. Also it would be impossible to distribute the gas to the individual consumers at such a high pressure.

Q. 490. Why would it be hazardous and unsafe? What would it probably do to it?

A. The danger from a possible explosion of the gas line in a heavily populated area, which would probably result in loss of life and damage to property.

[fol. 167] Q. 491. Why is it more hazardous to put it into the distributing pipes of the Memphis Power and Light Company than it is to have it at that pressure in your main line pipes?

A. The nature of our business is such that we must operate at high pressure in order to move our gas. The pipe line system is constructed to be operated safely at those pressures.

Q. 492. And is their distribution system constructed so as to be operated at those pressures, or not?

A. It is not.

Q. 493. Do they have smaller pipes, or larger ones, or are they not as deeply imbedded in the ground, or what is the reason for it?

A. The lines themselves are not designed—the construction is lighter, the individual regulators and district regulators which are used in a large distribution system would not be able to operate from an extremely high pressure to a very low pressure at which the gas is utilized.

Q. 494. For what reason is it impracticable to serve it to consumers at that high pressure?

A. Economy from the standpoint of the consumer for one thing, and safety.

Q. 495. Why would it be dangerous to have it done under high pressure, if it would?

A. Danger from explosion. Increased leakage.

Q. 496. Why would that be more dangerous from explosion?

[fol. 168] A. The design of the equipment in which the gas is handled.

Q. 497. You say the Commonwealth Gas Corporation owns a controlling interest in the Memphis Natural Gas Company, is that right?

A. Yes sir.

Q. 498. Does the Commonwealth Gas Corporation do any business in Tennessee at all?

A. It does not.

Q. 499. Own any property in Tennessee?

A. No sir.

Q. 500. Now this statement you have made about the Electric Bond and Share Company and the National Power and Light Company, and their relations with one another and with other people, do you know those things of your own knowledge, or are they just what you have heard, which?

A. They are just what I have heard. I have not had occasion to look them up and check them.

Q. 501. Have you ever examined the records of the Electric Bond and Share Company, or the National Light and Power Company, or the Memphis Power and Light Company, to see what connection, if any, there is between them?

A. I never have.

Q. 502. Take the United Gas Company—did the United Gas System, or the United Gas Pipe Line Company, do you know of your own knowledge what percentage of stock, if any, is owned in them by the National Power and Light Company?

[fol. 169] A. I know that there is some interest held, but what it is, of my own knowledge I do not know.

Q. 503. Do you know of your own knowledge what control, if any, is exerted by National Power and Light Company or Electric Bond and Share Company over that company, of your own knowledge?

A. No sir.

Q. 504. Now is there any connection of any kind between the Commonwealth Gas Corporation and the Electric Bond and Share Company?

A. There is none.

Q. 505. Any inter-relating stock ownership, so far as you know?

A. No, sir.

Q. 506. Is there any connection of any kind between the Commonwealth Gas Corporation and the National Power and Light Company?

A. No sir, there is not.

Q. 507. and stockholdings one way or the other?

A. There is not.

Q. 508. Any connection of any kind between the Commonwealth Gas Corporation and Ebasco Services Incorporated, as it is called?

A. There is no connection, no stock ownership one way or the other. There is none.

Q. 509. Now you have testified that the National Power and Light Company owns some stock in the Memphis Natural Gas Company?

A. Yes sir.

[fol. 170] Q. 510. Do you know what percentage that is of the total stock ownership?

A. I was informed recently by the transfer agent in New York that that amounted to one hundred fifty thousand shares.

Q. 511. Out of the total of what?

A. Approximately 918,000 shares.

Q. 512. What percentage would that be?

A. That is, roughly, sixteen per cent.

Q. 513. Now do the National Power and Light Company and the Commonwealth Gas Corporation have their offices in the same building in New York City?

A. They do not.

Q. 514. Where are the offices of the Commonwealth Gas Corporation in New York City?

A. At 50 Broadway.

Q. 515. Where are the offices of the National Power and Light Company?

A. They are on Rector Street. I don't know——

Q. 516. Number 2 Rector Street, is it?

A. That is correct.

Q. 517. Where are the officers of the Electric Bond and Share Company?

A. I believe they are at the same address.

Q. 518. Number 2 Rector Street?

A. Yes sir.

[fol. 171] Q. 519. And Ebasco Services Corporation?

A. At the same address.

Q. 520. Has the National Power and Light Company, so far as you know, either controlled or attempted to control any action of the Memphis Natural Gas Company?

A. They have not.

Q. 521. Has the Electric Bond and Share Company ever interfered in its management, or ever controlled or attempted to control it?

A. No sir, they have not.

Q. 522. Has the Ebasco Services Incorporated ever controlled or attempted to control any action of the Memphis Natural Gas Company?

A. No sir.

Q. 523. Has the Memphis Power and Light Company ever controlled or attempted to control any action of the Memphis Natural Gas Company?

A. Not to my knowledge.

Q. 524. Has anyone of those companies—that is, Electric Bond and Share, Ebasco Services Incorporated, National Power and Light Company, or Memphis Power and Light Company, ever attempted to influence any executive officer of the Memphis Natural Gas Company so far as you know, in any way?

A. So far as I know they have not.

Q. 525. Now when you have these contractual settlements, [fol. 172] that is adjustments under this contract, state whether or not those settlements have been made between the two companies, have they the Memphis Natural Gas Company and the Memphis Power and Light Company?

A. They have.

Q. 526. What have you to say as to the methods of the one dealing with the other as to whether it is done at arms length, or otherwise?

A. It has been conducted at arms length. The procedure is for an independent auditor to arrive at the basis, and we take the figures of this independent auditor.

Q. 527. Are there many arguments between the two companies about this contractual settlement?

A. There are many arguments about it. They are practically endless.

Q. 528. How long does it take sometimes to get together on those contractual settlements?

A. Anywhere from three months to a year.

Q. 529. Do you know whether or not at one time there was any threat of litigation over one of those contractual settlements?

A. I know that there was.

Q. 530. Who was getting ready to sue who?

A. The Memphis Natural Gas Company was preparing to sue Memphis Power and Light Company.

Q. 531. Now in the cross examination Mr. Pope, in ask- [fol. 173] ing you a question, used the expression about the different customers you have named and asked you whether they were municipalities. Now in the sense of customers, how many customers have you in Shelby County?

A. One.

Q. 532. And who is that?

A. Memphis Power and Light Company.

Q. 533. Then the municipalities you named, like Capleville, Collierville and others, who distributes in these municipalities the gas to customers?

A. They are customers of the Memphis Power and Light Company.

Q. 534. And so far as the Memphis Natural Gas Company is concerned what are they? Delivery points, or what are they?

A. They are measuring stations on our pipe lines.

Q. 535. Where you deliver gas to whom?

A. Memphis Power and Light Company.

Q. 536. Another question you were asked, and I did not get your answer clearly. Leaving aside the Memphis Power and Light Company does the Memphis Natural Gas Company sell directly to any industry in Shelby County or in the City of Memphis, Tennessee?

A. It does not.

Q. 537. Did it during the years 1932 to 1935?

A. It never has and does not now, anywhere.

Q. 538. Now then your employees in the office at Mem- [fol. 174] phis, you said you were not certain about the number. But regardless of the number, what type of employees are they?

A. They are accountants, bookkeepers, clerks.

Q. 539. Does their business relate merely to what is done here in Memphis, or does it relate to business done throughout the entire lines of the company?

A. It is entirely the office of the whole system.

Q. 540. Does this office of the Memphis Natural Gas Company, does it have to be maintained in Memphis, or could it be maintained anywhere else?

A. It could be maintained anywhere.

Q. 541. Do you know how many bank accounts the Memphis Natural Gas Company has?

A. I do not.

Q. 542. Do you know how its payrolls in the State of Tennessee compares with its payrolls outside of the State of Tennessee?

A. We have a schedule here on that.

Q. 543. All right.

A. In the year 1932 the percentage of the payrolls in the State of Tennessee was 10.8.

Q. 544. That was 1932?

A. That is in the year 1932.

Q. 545. What about 1933?

A. It does not include the officers and clerical.

Q. 546. Have you got it including them?

A. The offices and clerical amounts to 27.2%, but that [fol. 175] is not entirely in Memphis.

Q. 547. What about 1933?

A. In 1933 it was 6.7%, and the officers and clerical total was 28%.

Q. 548. Is that office and clerical exclusively the office and clerical work here in Memphis, or not?

A. Not entirely.

Q. 549. All right now; 1934?

A. In 1934 the Tennessee percentage was 6.7%. The office and clerical was 30.07%.

Q. 550. In 1935?

A. In 1935 the Tennessee percentage was 9%, and the offices and clerical 27.9%.

Q. 551. Now in each one of those years, in order not to repeat each time, state whether or not the office and clerical relates to the office and clerical work everywhere, or merely in Memphis?

A. It relates to the entire system.

Q. 552. Now of your own knowledge do you know of a management contract between the National Power and Light Company—whether there is a management contract between National Power and Light Company and Memphis Power and Light Company?

A. I know there is a management contract between the—would you repeat that question.

Q. 553. Do you know of your own knowledge whether [fol. 176] from 1932 to 1935 there was any management contract between the Memphis Power and Light Company and the National Power and Light Company?

A. No.

Q. 554. You don't know?

A. No sir.

Q. 555. Do you know of your own knowledge whether during those years there was any management contract between the Memphis Power and Light Company and the Electric Bond and Share Company?

A. No sir.

Q. 556. Now in dealing with the United Gas Corporation, or the United Gas Supply, what has been the method of the dealings between the Memphis Natural Gas Company and that company? Has it been at arms length, or like brother and brother dealings, or what?

A. No, it has been very much at arms length.

Q. 557. Illustrate what you mean?

A. The meters and meter charts in the field are read by the United Gas Company and we are billed for the amount of gas sold. They later send us those charts. We check them over carefully. We have a great deal of controversy and trouble with them about the pressures at which gas is delivered, and we regard them as simply a supplier of gas.

Q. 558. All right, in dealing with the United Gas Corporation, or the United Gas System, state whether or not you go through any other companies, or deal directly with them?

[fol. 177] A. We deal directly with their Houston office, or with their representatives in the Monroe Field. Usually directly with the President and Vice President of the company.

Q. 559. All right, in having your dealing with them do you confer with or consult any other company of the so-called Electric Bond and Share group?

A. No sir, we do not.

Q. 560. Now let me see if I understand you correctly—with what company does the Memphis Natural Gas Company have a contract for its supply of gas delivered to it in the Monroe field?

A. The contract originally was with the Industrial Gas Company.

Q. 561. What company is it with now?

A. Well, that contract, through acquisition is now owned by the United Gas Corporation.

Q. 562. Now have you a contract merely with one company for your supply of gas?

A. Yes sir, one company.

Q. 563. Then in addition to the United Gas Corporation or United Gas System, how do Southern Carbon and Interstate, and Hope Producing Company mentioned by you come into the picture?

A. The United Gas Corporation made that arrangement itself. They permit those other companies to make certain percentage of the deliveries to us. It is something [fol. 178] over which we have no control.

Q. 564. Is that true of the United Carbon too?

A. It is.

Q. 565. So as I understand it, your company's contract is with a single individual?

A. That is correct.

Q. 566. With the United Gas Corporation or United Gas System, and they in turn have arrangements with the other companies you have mentioned, United Carbon, Southern Carbon, Interstate and Hope Producing Company, by which they, in turn—when I say "they", I mean United Gas Corporation, obtain a part of the gas from these other companies which, in turn, the United Gas Corporation bills to you, isn't that right?

A. That is correct in effect. We recognize only the United Gas Corporation in our purchase of gas.

Q. 567. Now then Mr. Pope asked you and I think it is probably cleared up, but let's make it absolutely clear—whether you paid any corporation for things like lawyers fees and engineering services. Do you hire your own lawyers, the Memphis Natural Gas Company?

A. Yes, sir.

Q. 568. And pay them directly?

A. Yes sir.

Q. 569. And this engineer that you are talking about, [fol. 178] what kind *kind* of engineer is he?

A. Electrical.

Q. 570. Consulting engineer?

A. Yes sir.

Q. 571. The one hundred dollars a month you pay him, is that a retainer, like your lawyers retainer fee?

A. It is, yes.

Q. 572. State whether or not he has the same kind of arrangement probably with other companies?

A. Oh, he is an independent consulting engineer.

Q. 573. An independent consulting engineer. Is that a common arrangement under those circumstances?

A. Yes, sir, that is common.

Q. 574. Now then the gas delivered to the Memphis Power and Light Company for use as fuel in its power-house, and that delivered it for re-distribution to its customers, are they delivered at the same place, or different places?

A. At the same place.

Q. 575. Then where is that?

A. At the Brooks avenue station at the City Limits of Memphis.

Q. 576. Now then you have given, in answer to some questions, your idea about the reasons for certain provisions in the contract. Did you participate in any of the [fol. 180] negotiations that led up to the contract between the Memphis Power and Light Company and the Memphis Natural Gas Company?

A. I did not.

Q. 577. Did you participate in any of the negotiations between the West Tennessee Power and Light Company and the Memphis Natural Gas Company that led up to the contract?

A. No sir.

Q. 578. Did you have a copy of the contract before you this morning when you were answering Mr. Pope's questions about one of its provisions?

A. I did not.

Q. 579. Mr. Pope in some of his questions used the expression about "Business done in Tennessee by the Memphis Natural Gas Company". Did you do any business in Tennessee other than that that is incidental in the transportation and delivery of natural gas in Interstate Commerce?

A. No sir, that is our sole business.

Q. 580. Do you know how many different bank accounts the Memphis Natural Gas Company has?

A. I do not. Mr. Johnson will be able to tell you that.

Q. 581. Now this gas that is in your pipes, is that gas static, still, or is it flowing all the time?

A. It is always in motion.

Q. 582. Is there in your pipe line at any time gas that [fol. 181] is just still and stopped, and not in motion?

A. Never. The answer to that is clearly shown in the recording chart.

Q. 583. Have you seen those charts, examined them from time to time?

A. Very frequently, yes sir.

Q. 584. And is that flow continuous, or intermittent?

A. It is continuous.

Q. 585. And was it during those years, in the State of Tennessee?

A. It always has been, yes sir.

Mr. Armstrong: That is all.

Recross-examination.

By Mr. Pope:

Q. 586. Does the alterations that takes place in the natural gas in your pipe lines before and at the time of delivery change the status of the gas by way of increasing or decreasing it?

A. I don't quite understand the question, Mr. Pope.

Q. 587. In the volume of gas, in other words you start it at a certain pressure, and you change the pressure two or three times before it is delivered. Now what I want to get is whether or not that mechanical process the gas goes through increases or decreases the volume of the gas?

[fol. 182] A. If I understand you correctly, it does change; the volume of the gas, yes, in the line, from hour to hour, might change.

Q. 588. Well, to make myself clearer, suppose there was a thousand cubic feet of gas delivered over in the field——?

A. Yes, sir.

Q. 589. (Continuing) Delivered over in the field at a certain pressure; you transport it on down in your pipe line to where you are going to deliver, and there you change the pressure; now what I want to know, is it still just a thousand feet or more than a thousand, or less than a thousand?

A. No, there is still just a thousand feet. Any unit volume of gas of course remains the same thing.

Q. 590. Well, don't a larger pressure mean that the gas is confined in a less receptacle, so to speak?

A. That is true.

Q. 591. Well, then, wouldn't there be more gas?

A. No sir. A thousand cubic feet of gas at our base pressure is a thousand cubic feet of gas. If you mean, does a thousand feet of gas at one hundred pounds occupy more, or less space than a thousand feet at fifteen hundred pounds, I will say it is, the higher the pressure the smaller the space required to contain it. That is a fact.

Q. 592. Well, a cubic foot of gas is not measured by anything except space, is it? It is not measured by weight, or [fol. 183] anything of the kind, or by the pressure?

A. The standard of measure is a thousand cubic feet of gas at a definite pressure above atmospheric pressure and at a certain temperature.

Q. 593. Now you speak of these payrolls. For 1932 you say the payroll for employees other than officers and clerical force was 10.8%, if I understood you correctly?

A. Yes, sir.

Q. 594. In Tennessee?

A. Yes, sir.

Q. 595. Where could there be any other expense except on the line down here from here to Monroe?

A. There could not be.

Q. 596. Well, why is it only 10.8%? Where is the other 90%, so to speak, 89.2%?

A. It is spread out over the line.

Q. 597. You mean there is 89.2% of it in Arkansas, Mississippi and Louisiana?

A. No, the officers and clerical payrolls as I testified was 27.2% of the total payroll, leaving 72.8%.

Q. 598. Well——?

A. Now that 72.8% is labor up and down the entire system, of which 10.8% is in Tennessee.

Q. 599. Where is it paid from?

[fol. 184] A. The checks are issued in the Memphis office.

Q. 600. Then all of that business, instead of 10.8% being done in the Memphis office, it is all done in the Memphis office, if I understand you?

A. Well, the business of writing checks is. The checks are delivered to the employees where they live at the various points in the various States, and the money is sent there.

Q. 601. Well, what I asked you and what I think Mr. Armstrong asked you was how much of that was paid out of the Memphis office?

A. No, I didn't so understand.

Mr. Armstrong: No, I didn't ask him that.

Q. 602. Then it was all paid out of the Memphis office and distributed along the line in other States?

A. Of course.

Q. 603. But the transaction of the business itself of the Memphis Natural Gas Company is in Memphis, isn't it?

A. The books are kept here, yes sir.

Q. 604. Please answer my question; now isn't the business of the Memphis Natural Gas Company done in Memphis?

A. No.

Q. 605. Where is it done?

A. It is done in Louisiana, Arkansas, Mississippi and Tennessee.

Q. 606. Is there a man in Louisiana, Arkansas or Mississippi that can make an entry on the books?

[fol. 185]

A. No, sir.

Q. 607. Is there a man in Mississippi, Louisiana or Arkansas can issue a check?

A. There is not.

Q. 608. Is there a man in Mississippi, Louisiana or Arkansas can make a bank deposit?

A. No.

Q. 609. Is there a man in either one of those States who can draw money out of the bank?

A. There is not. But that is not the business of the company, as I understand the term "business."

Q. 610. Well, you don't understand that the business of the company is where a laborer is using a shovel and pick, do you?

A. No sir. As I understand it would be the distribution of gas, and that is where it has happened.

Q. 611. I am asking where the business itself is transacted?

A. I will answer it by saying the office is in Memphis and the books are kept here.

Q. 612. And books,—and all other business except the office itself is out of the State,—a certain per cent of it?

A. No. There is consumption of materials——

Q. 613. (Interrupting) Who buys materials?

A. To me, Mr. Pope, the location of a business is where [fol. 186] the investment is. Now the investment is spread out over those States.

Q. 614. The business is where the thing itself is——?

A. At the time.

Q. 615. In other words, if you were in Memphis and selling roofing, and a man takes the roofing to Middle Tennessee and puts it on a house, the business would be done where the house is, is that your theory?

A. It is not my theory. But if I were a manufacturer of roofing, my business would be where the plant would be. If I was engaged in the business of moving roofing across the Country, that is where it would be.

Q. 616. If you are in business selling roofing it would be at the place where you are selling it, sending it out, and keeping the books and collecting for it?

A. If I were in that business, that is true.

Q. 617. You are in the gas business, so far as these things we have been talking about, is done in the office at Memphis, isn't it?

A. That seems to me a matter of opinion. My opinion is that the business of the company is not in Memphis.

Q. 618. Has the company got any office in Louisiana?

A. Yes.

Q. 619. What sort of an office?

A. Small office. In fact you might say they have two [fol. 187] offices. We have an operating office at the Guthrie Compressor Station, and we have a station that is required by the Louisiana Laws in the City of Monroe.

Q. 620. You have to keep it there to observe the law?

A. That is true.

Q. 621. Where you take the gas from the earth?

A. That is true.

Q. 622. Or use it, that other people have taken from the earth?

A. Yes, sir.

Q. 623. But there is no business transacted there other than is in the jurisdiction of this office in Memphis, is there?

A. There are no books or records kept there except operating records.

Q. 624. The President of the company is in Memphis?

A. Yes, sir.

Q. 625. Is he the General Manager?

A. He is.

Q. 626. And he gives orders to these people all along the line and they are executed by them?

A. He is located here, yes sir.

Q. 627. Now just one other thing, to see if we understand each other: You told Mr. Armstrong awhile ago in redirect examination that the Memphis Natural Gas Company had not made any contract with the National Power and [fol. 188] Light Company for management, but what they have got is a contract of management with the Commonwealth Gas Corporation, isn't it, or the Commonwealth Gas System, I believe you call it?

A. Yes, the management control existence is between the Memphis Natural Gas Company and the Commonwealth Gas System.

Q. 628. That is right?

A. Correct.

Q. 629. Mr. Wallace, I notice in this statement which you have before you of the Memphis Natural Gas Company for the year 1937, and covering other years prior thereto back to 1929, page 11 at the bottom——?

A. All right.

Q. 630. It reads as follows:

"The City and County delivery contract mentioned in the above schedule contain the base rates for sale of gas to the Memphis Power and Light Company for specified uses" ——?

A. Yes, sir.

Q. 631. What does that mean?

A. That refers to that matter that we covered previously. The classification of gas and the rate that we received for it according to its classification.

Q. 632. The next sentence being—

"The total revenue from the sale of gas under this contract is subject to annual adjustment to equalize the profits [fol. 189] or losses of both parties as calculated by a complicated formula prescribed in the contract." What does that mean?

A. That refers to the adjustment which was the matter of testimony previously. The adjustment under the contract under which we calculate the net profits or deficits annually and adjust them.

Q. 633. The next sentence—"The effect of such adjustment which is made by the payment of cash by the proper party is to increase or decrease the revenue to the Memphis Natural Gas Company from the sale of gas under this contract". What does that mean?

A. Just what it says.

Q. 634. And that is that the amount of money that the Memphis Natural Gas Company makes depends upon the amount of money that the Memphis Power and Light Company and the West Tennessee Company makes, isn't it?

A. There is no such adjustment with the West Tennessee Power and Light Company.

Q. 635. Well, the Memphis Power and Light Company, then?

A. Yes, depending on what the Memphis Natural Gas Company, in turn, makes.

Q. 636. That is what I say?

A. Yes, sir.

Q. 637. That is the determining point?

A. And that depends on the result of the operations of [fol. 190] both companies under the formula which is described in the contract.

Mr. Pope: All right, that is all.

Further deponent sayeth not.

(Signature waived.)

Sworn to and subscribed before me this 14th day of November, 1938. Henry Rawlinson, Notary Public, Shelby County, Tennessee.

[fol. 191] DEPOSITION OF BIRGER L. JOHNSON

The next witness, MR. BIRGER L. JOHNSON, having been duly sworn, deposed as follows:

Direct examination.

By Mr. Armstrong:

Q. 1. What is your name?

A. Birger L. Johnson.

Q. 2. How old are you, Mr. Johnson?

A. Fifty-two.

Q. 3. Where do you live?

A. Memphis, Tennessee.

Q. 4. What connection, if any, have you with the Memphis Natural Gas Company?

A. President and Director of the company.

Q. 5. How long have you been president?

A. Since January 1935.

Q. 6. Before that time in what capacity were you connected with the company?

A. I was Vice-President and Director of the company from its inception until 1931.

Q. 7. Have you been familiar with the affairs of the company all the time from 1932 to 1935?

A. From 1934 and 1935.

Q. 8. You were not, before that time?

A. Not as much as I am at the present time. I was not an officer of the company.

[fol. 192] Q. 9. Mr. Johnson, I show you a map which is Exhibit A to the deposition of Mr. Henry C. Wallace, and ask you whether or not that map correctly shows the pipe lines of the Memphis Natural Gas Company as they existed at all times you are familiar with it?

A. Yes sir.

Q. 10. What business has the Memphis Natural Gas Company been engaged in since you have known of it?

A. None other than the sale of natural gas at wholesale.

Q. 11. Where did they get it and where did they sell it?

A. Buy the gas in Monroe Field at Louisiana and sell it at wholesale to public utility companies in Louisiana, Arkansas, Mississippi and Tennessee.

Q. 12. To what companies does it sell at wholesale in Tennessee?

A. In Tennessee the Memphis Power and Light Company and West Tennessee Power and Light Company.

Q. 13. Are these sales made on written contracts with those companies?

A. Yes sir.

Q. 14. Will you please produce a copy of the contract between the Memphis Power and Light Company and the Memphis Natural Gas Company.

(Documents produced.)

Q. 15. How many contracts have you with the Memphis Power and Light Company?

A. Two.

[fol. 193] Q. 16. Now then Mr. Johnson, I will ask you to produce the original of the contract between the Memphis Natural Gas Company and the Memphis Power and Light Company under which the Memphis Natural Gas Company delivered gas to the Memphis Power and Light Company, in turn to be distributed and resold by the Memphis Power and Light Company. Have you got the original?

A. Yes sir.

Q. 17. Is this it?

A. Yes sir.

(Document handed to Mr. Pope, counsel for defendants.)

Q. 18. Now in addition to the original have you before you a certified copy, certified by the assistant secretary of the company, of that contract?

A. It seems to be.

Q. 19. All right sir. I ask you to make as Exhibit A to your deposition this copy of the contract between the Memphis Natural Gas Company and the Memphis Power and Light Company under which gas is sold by the Memphis Natural Gas Company to the Memphis Power and Light Company to be distributed by the Memphis Power and Light Company to its customers and consumers?

A. I do so.

Mr. Armstrong: Are you willing for the record to show, that by agreement that copy may be treated with all the force and effect as the original, subject to any comparison [fol. 194] you would like to make, as to the accuracy of the copy?

Mr. Pope: That is agreeable to the defendants.

The said document was accordingly marked, for identification, Exhibit "A" to the testimony of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 195] Q. 20. I ask you to produce the original of what is known as the powerhouse contract; that is, for the sale of fuel gas by the Memphis Natural Gas Company to the Memphis Power and Light Company.

(Document produced and handed to counsel.)

Q. 21. Is this it I have in my hand, and you have before you?

A. Yes sir.

Mr. Armstrong: We exhibit that to counsel for the defendants. Let the record show the original contract was passed to counsel for the defendants.

Q. 22. Now I ask you to make as Exhibit B to your deposition a certified copy of that fuel contract?

A. I do so.

The said document was accordingly marked, for identification, Exhibit B to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 196] Q. 23. Now Mr. Johnson, have you the original of the contract between the Memphis Natural Gas Company and the West Tennessee Power and Light Company for the sale of gas by the Memphis Natural Gas Company to the West Tennessee Power and Light Company?

A. Yes sir.

Q. 24. Is that it in your hand?

A. Yes sir.

Q. 25. Please pass that to opposing counsel.

(Document passed to counsel for defendants.)

Q. 26. Please make that certified copy of that contract as Exhibit C to this your deposition?

A. I do so.

The said document was accordingly marked, for identification, exhibit C to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 197] Mr. Armstrong: Now Mr. Popo, I understand it is satisfactory in each case for these copies to be exhibited in lieu of the originals, with the right on your part to compare them at any time with the originals. Is that satisfactory?

Mr. Pope: That is satisfactory.

Q. 27. Now Mr. Johnson, are there any other contracts between the Memphis Natural Gas Company on the one hand, and the Memphis Power and Light Company on the other; and the Memphis Natural Gas Company on the one hand and the West Tennessee Power and Light Company on the other hand, for the sale of gas?

A. No sir.

Q. 28. Were there any during these years 1932 to 1935?

A. No sir.

Q. 29. Then state whether or not all of your sales to the Memphis Power and Light Company during those years were under these two contracts? Were they, or not?

A. Yes sir.

Q. 30. State whether or not all of your sales to the West Tennessee Power and Light Company during these years, 1932 to 1935 inclusive, were under that contract Exhibit C?

A. Yes sir.

Q. 31. Now what business is the Memphis Natural Gas Company in, and was it in the years 1932 to 1935?

A. In the business of purchasing gas, transportation and re-sale at wholesale to utilities companies for distribution [fol. 198] to private consumers.

Q. 32. Now during the years 1932 to 1935 what companies did you re-sell to, or did you sell to in Tennessee?

A. Memphis Power and Light Company and West Tennessee Power and Light Company.

Q. 33. Are those the only two?

A. Yes sir.

Q. 34. What business was the Memphis Power and Light Company engaged in in those years?

A. The distribution of gas and electricity to consumers in the City of Memphis and Shelby County, Tennessee, in the case of the Memphis Power and Light Company.

Q. 35. Was that a public utility in those years?

A. It was and is a public utility, yes sir.

Q. 36. During those years what business was the West Tennessee Power and Light Company engaged in, and where?

A. The West Tennessee Power and Light Company was in a similar business in the Western part of Tennessee, in a number of counties, located at Jackson. In the surrounding territory.

Q. 37. Now your pipe lines began where in 1932 and 1935?

A. Begin at Guthrie, Louisiana.

Q. 38. And extended where?

A. Extended in a northeastwardly direction, crossing the line into Arkansas, and then through the southeastern part of Arkansas, crossing the River just below Greenville into [fol. 199] Mississippi, and then follows a line as directly as possible up to Memphis. It has a spur line in Arkansas

going up as far as a town called McGeHee, and a line that extends over from Greenville to Greenwood.

Q. 39. Now during those years, 1932 to 1935, what were the mechanics of transporting natural gas from the Guthrie Field to Louisiana, Arkansas, Mississippi and Tennessee? How did you go about it?

A. Why, our compressor station at Guthrie, Louisiana, would receive the gas from the sellers, and compress it through the line, and deliver it to the taps along the main line to the customers that we serve.

Q. 40. Now after the gas was delivered to your customers at wholesale, as you say, what control, if any, did the Memphis Natural Gas Company have over the gas?

A. It had no control after it sold it to those utilities.

Q. 41. Was, or not, that true in the case of gas delivered to the Memphis Power and Light Company and West Tennessee Power and Light Company?

A. Yes sir.

Q. 42. During those years did the Memphis Natural Gas Company own any distribution facilities?

A. None whatsoever.

Q. 43. Now was the pressure just the same—did it just come out in a natural flow from Guthrie to Memphis and on to Jackson, or did that flow have to be accelerated at any point?

[fol. 200] A. It has to be accelerated, as in all similar lines. The compressor station at Guthrie pushed it out at around four hundred pounds. This was received at a lesser pressure. And then in the year 1932 no further compression was necessary until it reached Mississippi at Benoit. And at that point was the last boost that we gave the gas.

Q. 44. So from 1932 to 1935 you had how many compressor stations on the line?

A. Two.

Q. 45. At what places?

A. Guthrie, Louisiana, and Benoit, Mississippi.

Q. 46. Did you have one in Tennessee that was constructed, but perhaps not used?

A. We had one in Tennessee which was contemplated to be used, but the business was such that we never had enough business to make it useful, and never used it.

Q. 47. What else did you do in connection with the transportation of natural gas from Louisiana to Arkansas and Tennessee, other than compressing it in order to ascertain

how much the customer is getting and delivered at the proper pressure, and all?

A. We maintain regulators and measuring stations.

Q. 48. What do you mean by "regulators"?

A. A regulator regulates the flow of gas so as to make it practicable for users of the gas to receive it, because of our line pressure being very high. The distribution carriers have low pressure lines; if we delivered it at full pres- [fol. 201] sure it would be liable to blow up their lines. It is merely a method for delivery and convenience not to cause trouble.

Q. 49. Is that a separate undertaking from distribution, or is that an incidental matter to the delivery of gas?

A. It is necessary in all companies.

Q. 50. I say, is it a separate undertaking, or is it incidental?

A. No, it is incidental to our regular business.

Q. 51. How do you measure the amount of gas you deliver?

A. Measure it through meters.

Q. 52. Where are they installed?

A. Meters are installed at our line at the place of take-off of the gas which is sold to customers, to the utilities.

Q. 53. Where is the principal meter in Memphis?

A. At Brooks Avenue Station.

Q. 54. Now these other places in Shelby County to Memphis Power and Light Company, are they just at isolated spots, or are they where there are other municipalities to be served, or what?

A. In Shelby County?

Q. 55. In Shelby County.

A. In Shelby County there are several small communities we serve, and in what we call West Tennessee.

Q. 56. How do you sell it? Who do you deliver it to?

A. We sell the gas to the Memphis Power and Light Company in Shelby County. And they distribute it to the communities served.

[fol. 202] Q. 57. Do you have anything to do with the distribution at all?

A. No sir.

Q. 58. In Memphis, and Shelby County who bills the individual customers?

A. Memphis Power and Light Company.

Q. 59. Do you have anything to do with that at all?

A. No sir.

Q. 60. Who collects from them?

A. The Memphis Power and Light Company.

Q. 61. Who meters them?

A. The Memphis Power and Light Company.

Q. 62. Do you own any appliances in connection with that at all, or have any control over it?

A. None at all.

Q. 63. Your gas as it comes through your lines from Guthrie, Louisiana, to Memphis, and on to Jackson, is it, or not, in constant flow?

A. It is in constant flow. It never stops.

Q. 64. Do you store any gas in Tennessee, either in tanks, or underground, or in pipe lines, or any other way?

A. No sir.

Q. 65. Does any of your gas come to rest in Tennessee, and did it in the years 1932 to 1935, and if so how?

A. No sir, has never come to rest since we started the company.

Q. 66. Have you ever stored any gas in Tennessee from [fol. 203] 1932 to 1935 at any time?

A. No sir, we have no facilities for storing.

Q. 67. Do you have a telephone line?

A. Yes sir.

Q. 68. Is that a public telephone system, or private?

A. Our own private system.

Q. 69. Is it customary for pipe line companies of this kind to have a telephone system?

A. Yes sir, it is very necessary in the operation of the business.

Q. 70. Why is it necessary?

A. It is necessary for keeping in constant communication between various parts of the line, for facilities in delivering gas, and pressure, and also for maintenance and care to the line, because of blow-ups, or what might happen.

Q. 71. Do you have your line inspected, and if so, how?

A. We have our line inspected on the right-of-way by what we call line-walkers. They have certain distances they cover each day. And then of course there is an inspection, general inspection by the Superintendent and the men higher up.

Q. 72. If these line-walkers find anything wrong how do they report it?

A. Through our telephone system. Go — the nearest box. Every walk- usually goes from one telephone box to another. Reports in at each end.

[fol. 204] Q. 73. Can they cut in in the meantime if they want to?

A. If they are near the box. Of course the boxes are not very close together.

Q. 74. Do you make any commercial use of your telephone line, other than about your own business, this business you have described?

A. No sir.

Q. 75. Do you have maintenance crews for your line?

A. Yes sir.

Q. 76. Where are they located, and where were they in 1932 to 1935?

A. Most of our employees are outside of Tennessee. We have comparatively few in this State. Our maintenance, naturally most of the men are in Mississippi; that is, in other States, because the greater part of our lines are away from the State of Tennessee. We have, for instance, maintenance in Tennessee, for the Jackson line we just require about two. And in the State of Mississippi we have possibly about fifteen. And on the west side of the river, for Arkansas and Louisiana, approximately the same number. We have four, I might get confused there—we maintain camps, one at Eudora in Arkansas, and one down near Clarksdale.

Q. 77. Do you have crews at both compressor stations, at Benoit and Guthrie?

A. Yes sir, full crews at both stations, and the crew lives right in the company property.

[fol. 205] Q. 78. You said in answering you might get confused, you had four now—do you have four compressor stations at the present time?

A. Yes sir.

Q. 79. And only had two between 1932 and 1935, is that right?

A. Yes sir.

Q. 80. All right now. Take the payroll, not counting office employees, and give us the percentage of the payroll paid to the men who actually did work, then the percentage that applies for the State of Tennessee as compared to those that did the work in other States?

A. Do you want the numbers of employees——?

Q. 81. You may give that.

A. (Continuing) Or do you want percentages?

Q. 82. I wanted percentages.

A. The percentage of employees—I haven't got it. In the year 1932, nine employees—that is percentage of amount of money of the——

Q. 83. That is what I want.

A. (Continuing) Amount of money in Louisiana was, percentage of total was .189; Arkansas .121; Mississippi .310; Tennessee .108.

Q. 84. Now then does Memphis Natural Gas Company maintain an office in Memphis?

A. Yes sir.

[fol. 206] Q. 85. What do you do in that office?

A. Why, we have our office in Memphis as a matter of convenience, if I might say, more for the executives than any other reason, because Memphis is a large City, and from the standpoint of operation it perhaps would be better if we were away from Memphis. We have most of our men away from Memphis and Tennessee, and it is really just a matter of convenience. It is not necessary.

Q. 86. Is it incident to the local business in Tennessee, or is it to the handling of the entire business of the line?

A. Oh, to the handling of the entire business of the line. Most of the people in my office have more of their work away from Tennessee than in Tennessee.

Q. 87. Is the business of the Memphis Natural Gas Company large enough to require more than one real office where your records and things are kept?

A. No sir. We have a comparatively small office. It is not necessary to have a large office force.

Q. 88. Do you know how many bank accounts the Memphis Natural Gas Company kept in 1932 to 1935?

A. Altogether?

Mr. Armstrong: Yes?

A. Four, I think.

Q. 89. How many in Memphis?

A. Two.

[fol. 207] Q. 90. How many have you in Memphis now?

A. Two.

Q. 91. How many outside?

A. Two.

Q. 92. Has the Memphis Natural Gas Company paid ad valorem taxes in Tennessee, and did it pay them from 1932 to 1935?

A. I think so, to the best of my knowledge.

Q. 93. What?

A. 1932 to 1935?

Mr. Armstrong: Yes?

A. Yes sir.

(Off the record, discussion.)

Q. 94. I have produced receipts for ad valorem taxes for the years 1932 to 1935 inclusive and exhibited them to opposing counsel, and ask you to make photostatic copies of each one of these as Exhibits D-1, D-2, and so forth, respectively, to this your deposition?

A. I will do so. Mr. Pope, is it satisfactory to substitute photostatic copies for the originals?

(Exhibits D-1—36, inclusive.)

Mr. Pope: Yes sir.

Q. 95. Now Mr. Johnson, do you know the mileage of your pipe lines?

A. Yes sir.

Q. 96. What is it?

A. Well, divided into sizes, you mean?

[fol. 208] Mr. Armstrong: Yes?

A. Well, 211 miles of 18 inch lines; 59 miles of 10 inch; 61 miles, approximately, of 8 inch; 31 and a fraction miles of 6 inch; 5.17 miles of 4 inch. .7 of a mile of 3 inch.

Q. 97. Was that true in 1932 to 1935 inclusive?

A. Yes sir.

Q. 98. How much did you have in Tennessee in 1932 to 1935 inclusive, giving the diameters?

A. Tennessee 6.9 miles 18 inch; 59.47 miles of 10 inch; 39.50 miles 8 inch; 11.52 miles of 6 inch; 5.17 miles of 4 inch; .7 miles of 3 inch.

Q. 99. In 1932 to 1935 did Memphis Natural Gas Company, in Tennessee, deliver any gas direct to any industrial consumer? I am not talking about anything in connection with Memphis Power and Light Company.

A. No sir.

Q. 100. Does it now?

A. No sir.

Q. 101. Now under these contracts that you have exhibited, Exhibits A and B, so far as the Memphis Power and Light Company is concerned did you have a contractual settlement every year with them?

A. Yes sir.

Q. 102. Has there ever been any change or modification in either of those contracts?

[fol. 209] A. Not as to rates, no sir.

Q. 103. That is what I mean. I am talking about the contract with the Memphis Power and Light Company now—?

A. Yes sir.

Q. 104. Been any change in those contracts?

A. No sir.

Q. 105. Now those contractual settlements, have they been made, so far as you know, in accordance with the terms of the contracts?

A. Made on the terms of the contract, yes sir.

Q. 106. And in regard to those contractual settlements, have they been easy to arrive at, or difficult?

A. Well, rather difficult.

Q. 107. How long does it usually take you to get together with them on one of them?

A. Well, as an example we are working now, trying to arrive at a settlement for 1937, and we have not succeeded.

Q. 108. How long have you been working on it?

A. Been working on it all the year—most of the year.

Q. 109. Who does the work on it, so far as the executives are the Memphis Natural Gas Company is concerned?

A. Well, I do. Am supposed to, at least, and it is done by, a great deal of it is prepared for us by our independent auditor, Mr. Clater.

Q. 110. Who handles it for Memphis Power and Light Company?

[fol. 210] A. They handle it the same way.

Q. 111. What individuals?

A. Mr. Ford and Mr. O'Brien, and in conjunction with a New York Auditor.

Q. 112. Mr. Clater is a Certified Public Accountant who does the auditing work for the Memphis Natural Gas Company, is he?

A. Yes sir.

Q. 113. What connection has Mr. O'Brien with the Memphis Power and Light Company?

A. President of the company.

Q. 114. Mr. Ford?

A. Vice president.

Q. 115. Now these contractual settlements, are they conducted as between two loving brothers, or are they conducted at arms length?

A. Well, I would rather, if I may — so, rather we didn't have a contractual settlement, because it creates so much work, and difficulties; it is very burdensome to work out and arrive at what the contractual settlement calls for, and the City is a party to it, and it is my understanding that the City is more or less responsible for it.

Q. 116. Is there many, or few arguments in connection with these contractual settlements?

A. More arguments than we have anything else. We don't really have any arguments with them except on that. [fols. 211-212] Q. 117. What do you argue about, different items to be allowed, or what?

Mr. Pope: Let him tell it, Mr. Armstrong.

Q. 118. All right, what do you argue about, generally?

A. We argue as to the classification and where certain charges should be made in accordance with the contract. But the contract is not entirely one which we would operate on; for instance, the conclusions arrived at as to earnings are not in strict conformity with the reports that the Memphis Power and Light Company I believe, accept. It is a formula—well, as an example, the Memphis Power and Light Company in that contract is not allowed to charge anything in the way of depreciation on their property, which of course you can see is rather unusual. We are allowed to charge amortization. That has always been a cause of controversy. It is not ordinarily accounted in that way in utility cases but the depreciation charges are always recognized, but in this agreement it is absent.

Q. 119. Was there ever any threat of litigation in connection with these contractual settlements?

A. Litigation on whose part?

Q. 120. Between the Memphis Natural Gas Company and the Memphis Power and Light Company?

A. Well, if it had not been that the City was a party to it I imagine there would have been litigation at times, because it is very complicated, but we have tried to operate in har-
[fol. 213] mony so as to avoid public controversy, and have the City satisfied. The purpose of the agreement is merely to allow both companies a fair return on the moneys invested, and when such a return has been reached, if it is reached, then the City steps in and gets anything above that; that is, that amount is to be used for reduction of gas rates to the small consumers in Memphis. It is an automatic arrangement for adjustment of rates at any time in which we receive a larger amount than what we are entitled to under this contract. It is with three parties, and the City, we file a copy of the contract up with the City.

Q. 121. Do you know whether this question, whether the Memphis Natural Gas Company was engaged solely in Interstate Commerce, has been r o with the State for a number of years, and whether one of t e assistant attorney generals rendered an opinion on it?

A. Yes sir.

Q. 122. I hand you what purports to be a copy of an opinion by Honorable Edwin F. Hunt, Assistant Attorney General of the State of Tennessee, dated May 4th 1936 and ask you to make that Exhibit E to this your deposition?

A. I do so.

The said document was accordingly marked, for identification, Exhibit E to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 214] Q. 123. I believe the Memphis Natural Gas Company is admittedly a Delaware Corporation, is it?

A. Yes sir.

Q. 124. Maintains an office in Delaware?

A. Yes sir.

Q. 125. By the way, who is your contract with by which you obtain the natural gas in Louisiana?

A. It was originally with the Industrial Gas Company.

Q. 126. Who is it with now?

A. It is now with the United Pipe Line Company.

Q. 127. What accounts for the change?

A. The change was due to change in corporate structure, I believe, of the original company. It passed out into the new company, I understand, I am not sure, but the same interests we originally had the contract with.

Q. 128. Is it the same product?

A. The same product, oh yes.

Q. 129. Do you have just one contract for your gas?

A. We have just one contract for the purchase of gas.

Q. 130. Does the seller to you have arrangements with other companies by which they contribute a quota?

A. Yes sir.

Q. 131. Do you have anything to do with those contracts?

A. We have nothing to do with them. We pay the one company.

Q. 132. Has the Memphis Natural Gas Company anything [fol. 215] to do with the management of the Memphis Power and Light Company?

A. No sir.

Q. 133. Vice versa does the Memphis Power and Light Company have anything to do with the management of the Memphis Natural Gas Company?

A. No sir.

Q. 134. Where is the office of the Memphis Natural Gas Company?

A. Sterick Building, room 931.

Q. 135. Where is the office of the Memphis Power and Light Company?

A. Across the street at the corner of Madison and Third.

Q. 136. Do you know whether it occupies a whole building there that it owns?

A. I believe it does, yes sir.

Q. 137. What is the relation between the Memphis Power and Light Company and the Memphis Natural Gas Company?

A. Buyer and seller of gas.

Q. 138. Have you any interest in the gas after it is delivered to the Memphis Power and Light Company?

A. We have nothing to do with it.

Q. 139. Any interest in it, after it is delivered to the West Tennessee Power and Light Company?

A. No sir.

Q. 140. Does the Memphis Natural Gas Company, did it during the years 1932 to 1935, own, maintain or operate any equipment, service lines, instrumentalities for the local dis- [fol. 216] tribution of natural gas?

A. No sir. Never has.

Q. 141. Ever have any control over the Memphis Power and Light Company at any time?

A. No sir.

Q. 142. Did that company ever have any control over the Memphis Natural Gas Company at any time?

A. No sir.

Q. 143. Mr. Johnson, as Exhibit One to the original bill in this case is a notice from the Department of Finance and Taxation of the State of Tennessee of an assessment of excise tax for the year 1935. I will ask you to make that copy Exhibit F to this your deposition?

A. I do so.

The said document was accordingly marked, for identification, Exhibit F to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 217] Q. 144. Do you know whether or not any distress warrant was issued as to that notice, and later withdrawn?

A. I understand there was; yes sir.

Mr. Armstrong: I wonder if we can agree on that, Mr. Porter, or do you know?

Mr. Porter: What is that, sir?

Mr. Armstrong: I wonder if we can agree on that.

Mr. Porter. A distress warrant was issued for 1935, and I understand it was issued. I don't know that it was ever withdrawn.

Q. 145. I hand you a notice from the sheriff's office of Shelby County, Tennessee, and distress warrant for the excise tax for 1935, and ask you to make that Exhibit G to your deposition?

A. I do so.

The said documents were marked, for identification, Exhibits G, to the deposition of Birger L. Johnson, and the same are hereto attached and made a part hereof.

[fol. 218] Q. 146. Was that tax ever paid, or anything ever done about it?

A. No sir.

Q. 147. Do you know whether that distress warrant was withdrawn?

A. Only that I was informed by our counsel that it was.

Q. 148. You were informed by your counsel that it was withdrawn?

A. Yes sir.

Mr. Pope: Of course that would be incompetent.

Q. 149. By the way, while I am on the subject, has the Memphis Natural Gas Company ever paid any Accruals, or set up any sum for the payment of any excise tax in Tennessee?

A. No sir.

Q. 150. Has it any Accruals for that purpose at the present time?

A. No sir.

Q. 151. It is alleged in the bill that April 24th 1938 it received an excise tax bill from the Honorable Lewis S. Pope for the years 1932, 1933 and 1934, alleged to aggregate the sum of $57,156.83. I will ask you to make a copy of that letter and excise tax bill and notice Exhibits H-1, and H-2 to this your deposition?

A. I do so.

The said documents, were accordingly marked, for identification, Exhibits H-1 and H-2 to the deposition of Birger L. Johnson, and the same are hereto attached and made a part hereof.

[fol. 219] Q. 152. It is also alleged in the bill that later, on June 9th 1938, Mr. Pope sent another excise tax bill and notice purporting to cover the years 1932, 1933, 1934 and 1935, in a corrected amount of $54,179.31. I hand you the original letter and ask you to make it Exhibit I to this your deposition?

A. I do so.

The said document was marked, for identification, Exhibit I to the deposition of Birger L. Johnson.

[fol. 220] Q. 153. I hand you letter dated June 29th 1938 from the Honorable Lewis S. Pope about this matter, stating "I will ask for distress warrant on May 4th, for the taxes of 1933, 1934 and 1935." Make that Exhibit J to this your deposition?

A. I do so.

The said document was marked, for identification, Exhibit J to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 221] Q. 154. I hand you letter dated June 17th 1938 from the Honorable Walter Stokes, relating to excise tax for 1932 to 1935, he being the Commissioner of Finance and

Taxation of the State of Tennessee, informing you it would be his duty to issue distress warrants covering those taxes, together with interest and penalty, if payment is not received by June 22nd. I will ask you to make that Exhibit K to this your deposition?

A. I do so.

The said document was marked, for identification, Exhibit K to the deposition of Birger L. Johnson, and the same is hereto attached and made a part hereof.

[fol. 222] Q. 155. Mr. Johnson, during the years 1932 to 1935 state what other earnings the Memphis Natural Gas Company had except those derived from the distribution and sale, as you have described, of natural gas, for the years 1932 to 1935, what other source of income?

A. Their return on an oil property

Q. 156. 1932 to 1935?

A. None other.

Q. 157. That oil property you referred to was gone into later?

A. Yes sir. 1937. That was an investment; not operation.

Q. 158. Mr. Johnson, are you on the Board of Directors of the Memphis Natural Gas Company?

A. Yes sir.

Q. 159. How long have you been on there?

A. I was on the Board of Directors from the inception of the company until 1931, then again from January 1935 to the present time.

Q. 160. During that time has either the Memphis Power and Light Company, or the National Power and Light Company or the Electric Bond and Share Company, or the Ebasco Service, Inc., ever attempted to influence the action of the Board of Directors of the Memphis Natural Gas Company?

A. No sir, not to my knowledge.

Q. 161. Has there anyone of those companies ever attempted to influence or control the actions of any executive [fol. 223] officer of the Memphis Natural Gas Company?

A. Not to my knowledge.

Q. 162. Do you know whether the offices of the Commonwealth Gas Company in New York and the Electric Bond and Share Company are in the same building?

A. They are not.

Q. 163. Where are the offices of the Commonwealth Gas Company?

A. The offices of the Commonwealth Gas Company are at 50 Broadway.

Q. 164. Where are the offices of the Electric Bond and Share Company?

A. 2 Rector Street.

Q. 165. Where are the offices of the National Power and Light Company?

A. I believe at 2 Rector Street.

Q. 166. The Ebasco Services?

A. I believe the same address, I am not sure.

Q. 167. I believe the National Power and Light Company does own some stock of the Memphis Natural Gas Company?

A. They do.

Q. 168. Do you know how many shares?

A. They did own, I know, 150,000 shares, and I presume that is still in the National Power and Light Company.

Q. 169. About what percentage would that be?

A. That is about 17%.

[fol. 224] Q. 170. Do you know whether or not there is any intimate relationship between the officers of the Commonwealth Gas Company and the officers of the National Power and Light Company and the Electric Bond and Share Company?

A. Not to my knowledge.

Mr. Armstrong: Take the witness.

Cross-examination.

By Mr. Pope:

Q. 171. Mr. Johnson, how long have you been in Memphis?

A. I came here first in July of 1934, and stayed here during the summer, two months, went back to New York, and returned here in January 1935. Have been here since that time.

Q. 172. What business were you engaged in before you came here, while you were in New York?

A. In New York I was in the investment banking business.

Q. 173. How come you to get in the gas business?

A. Well, do you want to know the whole story?

Q. 174. Well, I would like to know why you got into it?

A. Well, in the first place, Mr. Pope, I was Vice President of P. W. Chapman Company, who financed it and made the money possible for the building of the Memphis Natural Gas Company line. And our company did considerable gas financing, probably more than any other house in the country. It naturally threw me into contact with a good many gas people and I became, I would say, [fol. 225] as an investment banker, quite conversant with the gas business. Well, 1934 came along, I was offered the presidency of the company. I told them I would like to come to Memphis and look over the situation before I accepted the position, and I did that, and came back and told them I would accept it.

Q. 175. Things looked good, and you came back?

A. Well, things looked bad in my own business, and looked better in this business.

Q. 176. Who was the party that first approached you about coming to Memphis as Vice president of the Memphis Natural Gas Company?

A. Mr. Edwin L. Coyle.

Q. 177. Had he had considerable experience in the gas business prior to that?

A. Yes sir.

Q. 178. What company was his?

A. Well, he was interested in a number of companies. The West Virginia Gas Company——

Q. 179. West Virginia. All right——?

A. West Virginia Gas Corporation, the Ohio Valley Gas Corporation, and Kentucky Gas Corporation. And a number of others, I don't just recall them. His business was the gas business, buying and selling properties.

Q. 180. Who originated this idea of having a separate corporation for practically every step taken in taking natural gas from the ground to the consumer? That is, one [fol. 226] company seems to get it out of the ground and——?

A. You mean as applied to Memphis, or as applied to the industry in general?

Q. 181. Well, the industry in general is very largely under two or three parent concerns, is it not, in the United States?

A. Well, there are some big pipe lines, and since the depression for instance the Mo-Kan Gas Company was independently financed. That was taken over by one of the

larger companies during the depression, and is now owned by two companies.

Q. 182. But in this immediate territory down in here the natural gas business is largely controlled by the Electric Bond and Share and the Commonwealth Gas Corporation?

A. I would not say that, Mr. Pope. I don't believe that is true.

Q. 183. Well, what other one would you say, big concern?

A. You mean down in this territory?

Q. 184. Yes?

A. The Monroe Field, of course, is the nearest field to any large amount of gas, and in that territory the United Gas Company does own a great deal of gas fields, and then there is the Interstate Gas Company. That is a very large company.

Q. 185. It is one of the Electric Bond and Share Affiliates, is it not?

A. The Interstate and the Hope, to the best of my knowledge, are owned and controlled a great deal by the Standard [fol. 227] Oil Company. And then there is the Mississippi River Fuel, which brings gas from that same field up to St. Louis; that is owned and controlled jointly, as I understand it, by the Standard Oil Company and one other company, I don't know the other one. And then out in the field is the Arkansas Natural Gas Company, which is one of the largest producers of the Cities Service Subsidiary, and they have no connection, for instance, with any of these others. Then there is the Southern Natural Gas Company that brings gas from the Monroe Field into the East, into Birmingham and Atlanta. Well, they are in the same —are much the same in the nature of its business to ours. It is a pipe line buying its gas in the Monroe Field. That company in turn is owned and controlled by the Federal Water Service Company, which is independent. For instance in our—in the case we buy where we have our contracts, with the United Pipe Line Company, which is a successor to the Industrial Gas Company.

Q. 186. You mean you have your contract to purchase from that company?

A. From the United Gas Pipe Line Company which is a successor Company to the original Industrial Gas Company, but they only supply us about 30% of our gas, originally supplied it all. They let us have gas from about four different companies.

Q. 187. Naturally, but you buy it through the same concern?

A. We pay for it on account of our contracts, but the gas [fol. 228] itself comes from these others, and we recognize our contract, we hold to our contract with the Industrial Gas Company for fulfilment of it. They have taken in these others for some reason, I don't know just what, but they deliver to us, in part. But more of it now comes from others than it does from the Industrial Gas Company.

Q. 188. You don't know anything about the construction of these pipe lines,—you were not connected with the company at the time it was constructed?

A. Well, yes, I was.

Q. 189. I thought you didn't come here until 1934.

A. Well, you didn't get that part of my answer to Mr. Armstrong, perhaps, Mr. Pope. I said I was with the company as Vice president and director from its inception, which was in 1928, until 1931. Then there was a lapsed period in which I was not connected with the company. I came back again in January 1935 as President and Director.

Q. 190. I see. Who actually constructed the pipe lines from the Monroe Field up to Tennessee and through Tennessee?

A. Well, the company I was with arranged for the money. We supplied the money.

Q. 191. I am talking about who did the work,—what company?

A. The construction company was called the——

Q. 192. (Interrupting:) Was it Ebasco?

A. No, the engineering company was—it just escapes my mind—Davis.

[fol. 229] Q. 193. Was it Columbia?

A. No sir; it was an independent engineering company, or constructing; not utility company.

Q. 194. No concern interested in the gas business did it, you mean?

A. No contract company. The contract at the time was let for constructing the main line of this company at a fixed price, plus a percentage of the profits. Ford, Bacon & Davis.

Q. 195. It was on a cost plus basis, wasn't it?

A. Yes sir, and we supplied the funds for that purpose.

Q. 196. Your banking concern?

A. Well, I might say I arranged a syndicate to get the money, and it might be interesting to you to know that in trying to get this money I did approach the bankers of the Electric Bond & Share people, but they turned me down.

Q. 197. Turned you down.

A. Yes; would not give me any assistance. So I had to get the money elsewhere. That is, I would like to have gotten the money. We worked,—of course, in building up this business they were against us doing it, you see. And finally, in an effort to get the money and not have a failure, I did approach them, but they turned me down.

Q. 198. Well, you buy your gas from a concern that the Electric Bond & Share Company controls, don't you?

A. I can't say as to that, Mr. Pope, definitely, because [fol. 230] there has been so many changes. Whether they control it or not, I don't know.

Q. 199. Don't you know that in financial circles, which you are evidently familiar with, that this United Gas Public Service Corporation that is owned by the Electric Bond and Share Company has got twenty-five million dollars and more in securities?

A. Yes, but we don't buy from United Gas Public Service Company.

Q. 200. Are you sure you don't?

A. Absolutely. We buy it of the United Gas Pipe Line Company.

Q. 201. Isn't that a successor to United Gas Public Service Corporation?

A. No sir. The United Gas Public Service Company is the distribution system of some companies, for instance the principal property, I believe is in Houston and serves Houston at Rayfield. The Pipe Line Company we buy our gas from is not in the utilities business. It is a producer, as I understand it, a seller of this gas, but not at Rayfield.

Q. 202. Now who was the originator of this idea of setting up a group corporation, the West Tennessee Power and Light Company?

A. The West Tennessee Power and Light Company, Mr. Pope, as I understand, has something to do—I am not sure of this—with the Electric Bond and Share. Certainly we have nothing to do with them. That is a holding company, to the best of my knowledge.

[fol. 231] Q. 203. I am talking about to whom you sell your gas here?

A. Oh yes, but how they were set up, I have no knowledge at all.

Q. 204. Were they here when you came?

A. Yes sir, I think that old company was here. My auditor tells me that he audited their books thirty years ago. That is long before we were in business. That is, at Jackson.

Q. 205. The local company up there didn't have any gas pipe lines, of course?

A. No sir.

Q. 206. You don't know who started it?

A. Who started West Tennessee?

Q. 207. I mean, who started that with reference to the contract that finally resulted in you all supplying them gas after they had built this pipe line? Who started the idea of building this pipe line?

A. That is different. I thought you asked me who started the West Tennessee Power and Light Company. Sure, I know what you are talking about. Mr. H. G. Scott, who was President of our company negotiated on that I understand. For the West Tennessee Line. Survey was made by Mr. Ralph Davis with the idea that if this company built a pipe line up in that territory at an investment of approximately a million dollars the line would return about fifteen per cent. [fol. 232] It looked fairly attractive, but it has since turned out that we have lost money on the thing. We would have been much better off if we had never built the line.

Q. 208. But you were responsible for it ever being built?

A. The Memphis Natural Gas Company put up the money.

Q. 209. For the line?

A. Yes sir.

Q. 210. And of course your company built the line up through West Tennessee, distributing it to the different towns there the same as this, is that right?

A. We don't distribute to the towns. We distribute only to the West Tennessee Power and Light Company, and they distribute in the towns.

Q. 211. That is what I say, you turn that over to them at what you call the City gate?

A. That is right.

Q. 212. And that is delivered in the West Tennessee towns the same as it is in Memphis?

A. That is true.

Q. 213. Now you speak of having regulators along your line, and especially, I assume, close to the places you are going to turn some gas out to someone?

A. Yes sir.

Q. 214. Now explain a little more clearly what a regulator is?

[fol. 233] A. Well, the simplest description, I reckon, would be a mechanical contrivance which reduces the amount of flow of gas through our pipe line, which is a high pressure, into the system of the distributing company, and the purpose is that our line being at high pressure is constructed a good deal stronger than their lines, and we must reduce the pressure so as to not blow out their lines.

Q. 215. In other words the status of the gas is such when it arrives at the point you want to take it off and put it into distributing pipes, that it is not in proper condition to deliver, you have to alter it, change it?

A. We don't change it except as to its feet of pressure.

Q. 216. And that is a very material change, isn't it?

A. It is for convenience, which all pipe lines do that transport gas similar to ours, because you cannot carry on the operation by delivering into a City distribution system gas at 400 pounds, because there is no system I know of in the Country, City system, that could operate or would be built for such high pressure.

Q. 217. All right, now as I understand the gas arrives we will say at Brooks Avenue here in Memphis where your City gate is——?

A. Yes sir.

Q. 218. (Continuing:) At a pressure of 400 pounds, approximately—that is about right, isn't it?

A. A little less than that but it is approximate.

[fol. 234] Q. 219. Now, then, when you put it into the Memphis Power and Light Company pipes at Brooks Avenue what pressure is it?

A. The contract calls for 100 pounds as a minimum pressure which we can deliver to them; and 100 pounds is what is maintained for facility in measurement.

Q. 220. And that is what you actually reduce it, from approximately four hundred pounds to 100 pounds, and that is done by a mechanical device inside of your pipe line?

A. Yes sir.

Q. 221. Is that right?

A. Part of our pipe line equipment.

Q. 222. Well, it don't have anything to do with transporting gas, does it?

A. No.

Q. 223. Well, then, it is not a part of your pipe line; it is there for one purpose, namely to alter the gas so that it can be put into condition to be used by the consumer, isn't it?

A. I would say that it is done in every pipe line. We are no different from any other.

Q. 224. I am not charging you with being different. I am trying to find out what you do.

A. We reduce the pressure, as I explained, so as not to blow out our customer's line.

Q. 225. In other words there is a mechanical, or manufactured or whatever you care to call it, process that has to [fol. 235] be gone through with after the gas gets into Tennessee before it can be delivered to a consumer within any degree of safety at all?

A. I am not sure on that "process". I think it is a reduction of pressure.

Q. 226. Isn't that a process?

A. The gas is exactly the same. We don't treat the gas in any way except to reduce the pressure.

Q. 227. Well, isn't that a very material treatment?

A. Well, it is according to what you call treatment. Perhaps in your sense you would construe it as that, but I would rather do it differently.

Q 228. What would you call it?

A. I would say a mechanical device for reducing the pressure.

Q. 229. A mechanical device is all you could do it with, but the thing you do is a process, isn't it?

A. You have a different word there. Your conception of the word is different. Yours may be correct, but I use a different one.

Q. 230. Anyway, whatever you call it, you use the customary device by which you alter the gas from four hundred pounds approximately to one hundred pounds approximately?

A. Yes sir.

Q. 231. And then it is ready for consumption?

A. It is not entirely ready. Well, it is ready for our cus- [fol. 236] tomers to take, but he must reduce the pressure

along his system, because he cannot deliver at one hundred pounds.

Q. 232. He can't?

A. No sir.

Q. 233. The Memphis Power and Light Company charges it after they get it?

A. Yes sir.

Q. 234. But you do deliver, when you deliver it to them, at one hundred pounds?

A. Yes sir, so they will have a sufficient supply of gas. In addition it gives a factor of safety to supply. We could probably operate under more pressure, if necessary, but one hundred pounds is taken as the uniform figure.

Q. 235. How is the mechanical device operated, by what power?

A. It is an automatic device that compresses the flow of gas, and it is regulated by instruments, devices on the instrument itself.

Q. 236. Is someone in charge of that?

A. Yes sir.

Q. 237. All the while?

A. Well, we watch it as much as we can. We don't want to have it go wrong, and neither do they.

Q. 238. You have to watch that like in manufacturing shoes, stockings, or anything else?

[fol. 237] A. Not to that extent.

Q. 239. Don't take so many employees you mean?

A. We, for instance, go around, see if the device is going properly, at certain intervals. It is not necessary to stay with it day and night.

Q. 240. Now you have been pleased to use the word "wholesale", I notice, several times in your testimony. Just what do you mean by that?

A. Well, I would construe or define a wholesale rate as a price at which one sells any commodity to a retailer, and he in turn adds to that price a certain amount to allow him a profit.

Q. 241. That is your definition of a wholesaler?

A. I would say that.

Q. 242. And it seems to me pretty accurate, sir. Now you don't sell all your gas that way, do you?

A. Don't sell it all wholesale?

Q. 243. No, under your definition of wholesale?

A. We sell all our gas wholesale.

Q. 244. You have just said that a wholesale transaction is one where one party sells to another and the latter one puts a profit on it and sells it to a number of individuals?

A. I think that is true. Of course you can amplify on it, as you have done, perhaps.

Q. 245. All right now, all of this gas that you sell to the [fol. 238] Memphis Power and Light Company is not re-sold at a profit by the Memphis Power and Light Company, is it?

A. Well, Mr. Pope, on that bookkeeping, possibly they do in this way; in the case of the Memphis Power and Light Company they operate as you know an electric system and a gas system. Our business is confined entirely to our relations with the gas end of their business, and in the sale to them of gas they use it for re-sale to various customers and consumers in Memphis and Shelby County, and they recently got going a powerhouse contract; I regard the gas department as selling gas to their electrical department for use as fuel in their electric generating station.

Q. 246. Well then, by that line of reasoning you would say if they bought a carload of coal to fire a boiler with, they would sell that coal to the user of the electricity generated?

A. I would not say that the gas company would in that instance, because the gas company is not in the coal business. But the gas department is, in the gas business.

Q. 247. And it is selling that gas to the Memphis Power and Light Company for a definite, specific purpose covered by contract, namely consumption in its plant, is it not?

A. It is sold to the electric power plant, yes, by the gas department.

Q. 248. For consumption; so said in the contract?

[fol. 239] A. Well, if the contracts states that, then you are right.

Q. 249. Well, am I right?

A. I mean, the contract speaks for itself, and if the contract has that wording, that is it.

(Recess)

Q. 250. Has there, or not, even been any reduction of rate since the inception of this contract?

A. Reduction in price of gas to the Memphis Power and Light Company?

Q. 251. I mean, to the consumer, from the Memphis Power and Light Company?

A. Not since I have been connected with the company.

Q. 252. Well, wouldn't you have gleaned that information as to whether there had been before your connection?

A. My knowledge is, there has not been.

Q. 253. You have been connected with it since 1931, if I understood you, except a short period probably in 1934 or 1933?

A. In 1931. I became Vice president in 1935.

Q. 254. But you were Vice president in 1931?

A. At the end of 1931, yes sir.

Q. 255. Well, then, if there had been any reduction to the consumer by the Memphis Power and Light Company since the inception of the contract, you would likely know about it, would you not?

A. There was some sort of a reduction in there at the [fol. 240] time I was not connected with the company, to my knowledge, but I am not familiar with it. But I can get you the information.

Q. 256. But there is some sort of reduction to the consumer?

A. I think there has been. I am not certain, and I would like to have the privilege of making certain.

Q. 257. Yes. Well now, Mr. Johnson, under the terms of the contract between your company and the Memphis Power and Light Company there would have to be three conditions precedent before there would be a reduction in price to the consuming public in Memphis, would there not?

A. On our part?

Q. 258. On the part of the Memphis Power and Light Company, the right under which they would have, under your contract with it, to reduce the price to the consumer?

A. The modification of our contract with the Memphis Power and Light Company would have to have the mutual consent of both parties plus the City.

Q. 259. I understand, but under the Eleventh paragraph or Section of the contract I will ask you if it is not necessary, before that price would be reduced, that those three things or conditions precedent would have to be existent—first, that all the net deficits of both parties, your company and the Memphis Power and Light Company, for all contract years up to this time, as shown by the statements rendered under Articles 9 and 10 hereafter shall have been made up; [fol. 241] that is one; (b) in addition thereto the buyer shall

have received from the combined net surpluses, as shown by such statements, an amount equal to one and one half per cent of each of the respective amounts of the Buyer's investment shown under it; and (c) in addition thereto, that the Seller shall have received from the combined net surpluses, as shown by such statements, net earnings affording it a reasonable return in view of the hazards of the undertaking of the seller at the inception thereof. Now those three things would have to exist, all three of them, before under this contract there would be a reduction to the consuming-public, wouldn't there?

A. I would construe it that way.

Q. 260. Then, if there has been a reduction of the price to the consuming public as you state, evidently then these three things were existent?

A. I qualified my statement as to this reduction in rates, Mr. Pope, by saying I am not sure about a reduction in rates. I would like to check that and find it out. And as to whether parts of our contract like the question you are asking me,—we, a great many times have to go to our counsel for legal advice as to whether we should do certain things, because our contracts are so complicated.

Q. 261. I am not asking you to give me the advice you [fol. 242] get from your counsel. I am asking you to advise me. You are the administrator of this Memphis Office, ar-n't you?

A. I am, but on important matters, Mr. Pope, I don't act alone. I act with our Board and our counsel.

Q. 262. And sometimes you consult with the Commonwealth Gas System, too, don't you?

A. Not directly, no sir. I would not have anything to consult with the Commonwealth Gas Company about in matters pertaining to this. I would have my Board, my Directors and Counsel.

Q. 263. You pay them a fee for something?

A. Pay them for management.

Q. 264. I thought you were the manager?

A. We manage to a certain extent, but we don't do everything in connection with the company. That is, operations like Mr. Wallace and other men we have that are employed by the holding company, they give us service

Q. 265. What is your holding company?

A. The holding company, used in that sense, is the Commonwealth Gas Corporation.

Q. 266. You consult with it?

A. Well, when you say with it, just who do you mean there?

Q. 267. Its representatives. Mr. Wallace, who testified this morning, and others?

A. Well, with Mr. Wallace, yes. He is, of course, a Vice [fol. 243] president also of our company. And he represents, of course, the management company to a great extent.

Q. 268. How much is the management fee per year that you pay?

A. It is based on our earnings and returns. This year around in the neighborhood of sixty thousand dollars.

Q. 269. That is the biggest one source of expense that your company has, isn't it, outside of the purchase of the gas itself?

A. It is a large fee, but not entirely, as I get it—not—it was arranged, of course, that fee, through our holding company and for management purposes, and they do have a good deal, of course, to do with our company, and naturally would have, because they own approximately forty eight per cent of our stock, and in one company, that group owning that amount of stock in any company, naturally would exercise a good deal of control, or should.

Q. 270. Well, that is a natural thing for a person to look after investments, of course, but here it seems like they are running your affairs, you are just sitting by, sort of executing orders?

A. You mean, the Commonwealth?

Q. 271. Yes?

A. Well, let me say this, that the Commonwealth Gas Corporation owns about 48% of our stock. The balance of [fol. 244] our stock is pretty much scattered. We have over three thousand stock holders.

Q. 272. They don't have much trouble to get that other two and a fraction per cent in order to control it, do they?

A. It is what you call working control. Some companies are run under less amount of ownership than we, getting working control where the stock is well scattered.

Q. 273. So they have working control and can collect management fees, they are well fixed, aren't they?

A. Well, I would not say that that follows. You see the Commonwealth Gas Corporation has other properties besides the Memphis Natural Gas Company.

Q. 274. Sure, they have companies all over the country doing this business, and they are getting management fees from all of them, aren't they?

A. I am not on the Board of the management of Commonwealth.

Q. 275. But you do know as a general proposition in the circles in which you run or operate, that statement I have just made is true, isn't it?

A. And I think it is the proper thing that they can do that.

Q. 276. First tell me whether that is true, or not?

A. Whether it is true with companies generally owning control over other companies to get management fees?

Q. 277. Yes sir, especially in the gas business?

[fol. 245] A. I have not looked into the statements, but I would say from hearsay I don't think so.

Q. 278. Now this 48% that you say the Commonwealth owns in your company, is that 48% of the authorized capital stock, or the outstanding capital stock?

A. It is the outstanding stock. There is 918,000 odd shares of stock outstanding, and Commonwealth owns around 440,000 shares approximately.

Q. 279. Is that all common stock?

A. That is all common stock, yes sir.

Q. 280. Is there any Preferred?

A. There was Preferred at the time you are talking about, and it has been paid off.

Q. 281. The company has made enough money to pay that Preferred Stock?

A. We borrowed the money to pay the Preferred Stock.

Q. 282. Who did you borrow it from?

A. From several banks, including our local bank.

Q. 283. Did you get back to the Bond and Share to get that this time after you had not succeeded the first time?

A. I never went to them more than once. I knew they were not in favor of helping us.

Q. 284. Why did you go to them in the first place?

A. I had exhausted practically every source. I knew they were one of the biggest utilities in the country, and I went [fol. 246] to them as the last of the big houses, and then I had to organize a group of smaller houses in order to carry through my financing, and I was almost to the point at that time of having to give up the whole idea.

Q. 285. Did you get a certain portion of it at that time, from the Commonwealth Company?

A. The Commonwealth Company was not formed at that time.

Q. 286. Well, its predecessor?

A. No, we organized the Memphis Natural Gas just by itself and set up the corporate structure of the Memphis Natural Gas Company. We issued on the company six million three of first mortgage bonds, and one million seven per cent Preferred Stock at that time.

Q. 287. When did this Commonwealth Company acquire its 48% of this stock in your company?

A. At various times. In the first instance they had this smaller amount, and then in 1930 I believe the Commonwealth Gas Company made a deal with the Memphis Natural Gas Company whereby they purchased sufficient stock of the Memphis Natural Gas Company at approximately twenty dollars a share which provided the funds sufficient to pay off the entire bonded debt of the Memphis Natural Gas Company amounting to six million three. If this had not been done there was no question but what the Memphis Natural Gas Company would have gone into the hands of a receiver, because it was not earning sufficient money to pay interest and sinking fund on that debt.

[fol. 247] Q. 288. But they have been showing some very satisfactory results during those years 1932, 1933, 1934 and 1935, haven't they, on the whole—net profits?

A. Satisfactory to who?

Q. 289. Well, probably not to a New Yorker, but would it even be reasonably satisfactory to you and your associates?

A. No, it would not be to me. I can tell you approximately what they receive; it is about two and one half per cent over the period, and that is not based on any return on capital invested which it should have at this time. Two and one half per cent return on the average over the time they have had their money invested.

Q. 290. After all these management fees and things of this kind and character have been paid?

A. Management fees don't amount to a great deal in comparison to the portion of service they render. They have never made the money out of returns from the stock, or any other source to compensate them for the large investments they have of approximately six million and a half dollars in that company.

Q. 291. Then the management fee is to partially reimburse them for the lack of dividends on their stock—is that what you mean?

A. I would not construe it that way, no sir. If I were with Commonwealth Gas Company I would say that helps us some on a bad venture.

[fol. 248] Q. 292. What employees salaries and expenses are paid for by the Commonwealth Company to aid and assist your company in management?

A. Well, we have Mr. Wallace, who perhaps gives us more time than anyone else, directly.

Q. 293. He said this morning about one third of his time. Is that correct?

A. I think he is with us, that is what I would say also, about one third.

Q. 294. Who else?

A. I believe in Charleston, there is Mr. Bauman.

Q. 295. Charleston, West Virginia?

A. Yes sir, and several of his assistants.. He is the Treasurer. Was Treasurer at least during the time you have under consideration, and an office maintained there in the Commonwealth for the operation of the properties Commonwealth owned in that section and controlled. And there they also have gas engineers, for instance a couple of years ago when they thought they had natural gas at Brownsville here, and were quite excited about it, and I thought we had better look into it and see whether it was real natural gas or just a stock jobbing proposition, so I called up some of the gas engineers to come down here from Charleston and they made a survey of this territory and decided it would be foolish for us to try.——

Q. 296. (Interrrupting) Who paid them for that?

[fol. 249] A. We didn't pay for that. It came out of the Commonwealth Company.

Q. 297. Looking for more fields, or a nearer field, or to see whether it was there or not?

A. Well, it would be hazardous to us from the standpoint of competition if a big field had been brought in at Brownsville, the gas competing against us; we would have had to do something one way or the other to offset that. We could not, of course, just go to sleep on the job, and our investigation determined there was not any gas.

Q. 298. All right now, you said a moment ago in direct examination that you carried four bank accounts?

A. Yes sir.

Q. 299. Two of them in Memphis?

A. Yes sir.

Q. 300. Where are the other two?

A. One is at the Guarantee Trust Company; the other at the Marine Midland in New York City.

Q. 301. Do you carry bank balances up there?

A. Not very much.

Q. 302. Well, about what, now, would you say is your bank balance up there now in the bank?

A. Oh, I would say at the Guarantee Trust Company about ten thousand, and at the Marine Midland perhaps fifteen or twenty thousand.

[fol. 250] Q. 303. What is the purpose in carrying it up there?

A. Well, the reason for it does not apply at the moment. But the reason originally we did have quite a bit of bank balance, that was due to our depreciation reserve which at that time we allowed to accumulate in cash.

Q. 304. You don't mean you were afraid of the Memphis Banks, do you?

A. Well now, I would not say that.

Q. 305. Just out of an abundance of caution you put it in bigger banks?

A. You would possibly also, if you — half a million dollars, would scatter it.

Q. 306. I don't know what I would do if I had that.

A. I think I would. I would not leave it all in some small bank.

Q. 307. That is good judgment I should say.

A. Now we have our largest bank account in Memphis. Intend to keep it there.

Q. 308. And as a matter of fact all the collections checks and so forth you get through your office you deposit it in Memphis, don't you?

A. Yes sir.

Q. 309. And if there is any money goes to New York or anywhere else it is just a matter of convenience and safety, you transfer it from this bank up there?

[fol. 251] A. Diversification.

Q. 310. As a matter of fact the business of the Memphis Natural Gas Company is done through your offices here in Memphis?

A. That is right. You are speaking about the present time—You don't mean the past, do you?

Q. 311. I am talking about from 1932 to 1935.

A. Of course a little while ago you were talking about now. If you go back to 1932 and 1935, we did do some business in New York, yes sir.

Q. 312. That was due to financing; but the business was handled from the office in Memphis, wasn't it? Even then?

A. In 1932 and 1935 anything of a large financial nature we would have to conduct in New York.

Q. 313. Of course you would have to go up there later, for the——

Q. To get the money.

Q. 314. Like if you were going to borrow money in big sums now you would go up there, but you would have to radiate out of the Memphis office, wouldn't you?

A. Yes sir.

Q. 315. And if you were called upon as you are now testifying as to where your principal business, and practically all of it, the Memphis Natural Gas Company is transacting, you would be compelled to say in Memphis, Tennessee, would you not?

A. Yes sir, at the moment. It was not up until recently.

Q. 316. Why wasn't it in 1932 to 1935?

[fol. 252] A. Because the company was originally started in the early days in New York. There were certain functions that were helpful to us, and the money that was raised to build this line was not raised in Memphis, only about three hundred thousand of the eight million dollars necessary to build this line was raised in this territory. Those bonds were also sold up in New York, in about thirty days for the money that was used to build this line here, through Eastern sources, principally.

Q. 317. Now we agree on that, as you know, and I am talking about where the business was transacted from by your company and for your company from 1932 to 1935. Wasn't the general office and the main office and the principal office in Memphis, Tennessee?

A. Main Office in Memphis, Tennessee.

Q. 318. And of course what business there was, whether it was big business transacted in New York, it was done through reference from the Memphis Office wasn't it, and associates you may have or auditors and assessors in New York?

A. That is right.

Q. 319. And all of this employment that you spoke of in answer to Mr. Armstrong's questions about being in Louisiana, Arkansas and Mississippi, the actual physical labor was done there, but the reports were all made to the Memphis office and the accounts were kept there and paid from the Memphis office, wasn't it?

A. That is a summation of all the reports of course, re-
[fol. 253] ports come to Memphis from Louisiana, Arkansas and Mississippi. We have the records. Most of our business here in Memphis is the reporting and taking care of men down the line and their operations, purchase and supplies and such things as that. The nature of our business where we only have five customers is, in itself, rather simple, because we bill them just once a month, work out the amounts, and there is very little work connected with it. Most of the work of this office is, as I said before, due to taking care of our operations outside of Tennessee.

Q. 320. But it is done in Memphis?

A. And it happens to be done in Memphis as a convenient place.

Q. 321. I am not asking whether it is any law that requires you to have it in Memphis. I am asking if it is not a fact that it is in Memphis and has been in Memphis?

A. The office, yes sir.

Q. 322. And that is all the work, so far as issuing checks, sending out bills and so forth, isn't it?

A. Yes, sir.

Q. 323. Now just to amplify a little, or clarify, you testified, if I understood you, several times, that you really had no control over the gas after it went into the pipe lines of the Memphis Power and Light Company and the West Tennessee Power and Light Company. You did not use the word that you had no interest in it, did you?

[fol. 254] —. Only, if you use the word interest, it would be only interest in receiving cash for the payment of the gas.

Q. 324. And the amount of the check that you got would depend ultimately upon the success of those two companies, wouldn't it?

A. Well, naturally, yes.

Q. 325. In other words, under your contract you not only received so much per cubic foot, or so much per thousand per cubic feet, for gas delivered in their pipe lines, but you

get that, and you also stood a chance to get more if they succeeded, or get less if they failed?

A. In our contractual settlement, that is the way it worked out. In effect it is an adjustment of rates.

Q. 326. So there may be no relationship very well between you except a contractual relationship?

A. It is a contractual relationship.

Q. 327. Then under your contract you share in their profits, or you share in their losses?

A. No sir, I would not agree to that.

Q. 328. You mean that is your construction of it, but you are too obstinate to agree with me, which is it?

A. No sir, I think I can prove to any fair minded person including yourself, I hope, that there is no profit sharing arrangement, but it is merely an adjustment of prices, and the agreement that was entered into at the inception of the [fol. 255] companies between the Memphis Power and Light Company and the City whereby we and they are allowed a fair return on our property, and the agreement automatically provides that after both of us have received a fair return, if as and when, that the rates to consumers, particularly the small consumers of the City of Memphis is to be lowered by a corresponding amount.

Q. 329. All right, but that only applies from that date on. What are you going to do with the accumulated excessive profits up to that time that makes it necessary to reduce rates to the consumer?

A. We don't have any. As I stated before we have only made about two and one half per cent.

Q. 330. I am just talking about what your rights are under this contract?

A. Well, I am most concerned with what we have done, and also what we might hope to do, and I know if we do make anything above the reasonable return on our property that we have to give such an amount of money back to the consumers in Memphis in lower rates.

Q. 331. Not any of that money you have already gotten, but it is only from that date on?

A. We never have been able to get any more than that.

Q. 332. But suppose you do, under the contract?

A. We could not under the contract get more than six per cent return, or whatever amount that is according to [fol. 256] the contract, commensurate with the hazards of the business from the date of its inception.

Q. 333. Who is going to determine what the hazards of the business are and intake of the business?

A. I think the City would have most to say about that. We would attempt to tell them what the hazards were, but the City is vitally interested at that point and would no doubt prevent us, if that were possible, from receiving an acceptable return.

Q. 334. Let me ask you a hypothetical case: Assuming this,—suppose on the 10th day of January, 1935, the Memphis Power and Light Company had made enough profits on its business to have complied with all of these conditions in here; that is, six per cent we will say, the reasonable return to them, the same amount to you, and suppose then they would have had fifty thousand dollars left over and above all of that, and after they had realized one and one-half per cent on their investment, what would have become of that fifty thousand dollars under this contract?

A. Under this contract we are allowed to earn any amount, as I have just stated, that would be commensurate with the hazards of the business at its inception. Of course that would be something, you know, that is controversial, would probably have to be decided by outside people, because we would insist the hazards were greater than the City would agree to, and somewhere along the line there would be an adjustment made.

[fol. 257] Q. 335. Well, the City is not interested in what has already been done under the contract; they could not make you pay money on what you had already earned; I am talking about what would become of that fifty thousand dollars accumulated, as I have just mentioned?

A. If we had not received sufficient return on our property the City would let us have it.

Q. 336. The City hasn't anything to do with it?

A. The City has to agree to it. We furnish the City every year the contractual settlement. If the City is not satisfied with what we are doing they have a right to audit, and our books are open to them at all times when this contract is in existence. It would have been better for us to operate without it, but it was done, inserted as I understand it on the part of the City so as to arrive at it automatically what must be allowed as a fair return, and anything above a fair return would automatically go to a readjustment of prices for the small consumers of Memphis, to lower the price.

Q. 337. But that would only apply to reduction of price

from that date on, and not apply to profits you had made prior thereto. Now what I am asking you what would become of that fifty thousand dollars, who would it belong to under this contract?

[fol. 258] A. Any moneys we are allowed to make naturally belong to the stockholders. What they would do with it would depend on what the Board of Directors decided.

Q. 338. What I am talking about, would your company and the Memphis Power and Light Company divide that fifty thousand dollars?

A. If the Memphis Power and Light Company had made six per cent, plus one and one half per cent on the investment in the company plant, under the contract we would come in and if approved by the City we would have it, provided we had any deficiency. If we did not have a deficiency, showed the same profit they did, if they were fifty thousand dollars over and we were fifty thousand dollars over, we would have to reduce the price of gas to the consumers of Memphis by one hundred thousand dollars.

Q. 339. You think there is something in this contract that gives that right?

A. Yes, sir.

Q. 340. If the Memphis Power and Light Company has made enough to pay its six per cent and in addition thereto one and one half per cent, and you have made nothing for your company from the sale of that gas to them to give you that six per cent which you just spoke of——?

A. Plus the amount necessary to compensate for the hazards of the investment at the initial inception of the company.

[fol. 259] Q. 341. Who are you going to get that from?

A. That is the chief part of the contract. That would be worked out between us.

Q. 342. Going to get it out of that fifty thousand dollars?

A. If it is coming to us.

Q. 343. If you get it anywhere, it is there?

A. It is an adjustment of our rates.

Q. 344. Out of that fifty thousand made by the Memphis Power and Light Company?

A. I would not say it is made by the Memphis Power and Light Company.

Q. 345. Who is it made by?

A. It is made by both of us. It comes back in adjustment of rates of gas in this contract here, with the City,

which was very difficult to work out. They use certain classifications, a lot of classes, as you know, as the contract states. Then it goes on with the other things necessary to bring about an adjustment and make lower rates possible for the citizens of Memphis and they probably never would have made it unless the City forced it on them, but they wanted a franchise of the City for distribution of gas. The contracts, I believe, are to the best of my knowledge, I think a part of the franchise. The City has a big stake in this thing, in the way of a return of money. But the companies were not lending money at that time. At the time it was written it was expected our company would [fol. 260] make more money than they have made. Really, gas was new, no one knew exactly what would be earned, and they had to set up a certain yardstick arrangement to try to take care of the future, but it never worked out because the earnings were never sufficient to give us the return we expected.

Q. 346. It seems you have maintained it though since 1928?

A. Well, I just told you awhile ago if it was not for our holding company we would have busted a few years ago, probably in 1931.

Q. 347. Your holding company bought stock?

A. Yes, sir.

Q. 348. And they get the full rate of interest on it and then get sixty thousand dollars a year for management?

A. If you think that getting a couple of hundred thousand dollars a year on an investment of over seven and one half million—seven and one half millions had been invested by them, and for that they get a couple of hundred thousand dollars a year. That to my mind is not adequate compensation for the money invested. I don't think you would think so either.

Q. 349. There is not any law which requires a company to earn profits in the guaranteed sense on an investment in the company?

A. It is the hazards of the business, and it was a poor investment for Commonwealth Gas Company.

[fol. 261] Q. 350. Now you said a moment ago it was your best impression that the rates had been reduced?

A. I said I think there was something about it, but I would like to have it confirmed. I don't want to make a

positive statement unless I am quite sure. I could get that information for you.

Q. 351. Now you spoke about settlements being hard to be made, that Mr. Armstrong would think you fellows were at each others throats. You haven't had any actual fights, have you?

A. Well, I have felt like it a couple of times.

Q. 352. But got by without it?

A. Well, it is not docile, as I have said, and I wish the agreement had never existed.

Q. 353. What do you fall out about?

A. Fall out because according to the agreement, it is not workable as it should be.

Q. 354. Well, they are not to blame for it if it is not workable. Why fall out with them about it?

A. It was something left with the Memphis Power and Light Company, and they discuss it as we have been doing here at the moment. I would not have the damn thing.

Q. 355. What damn thing are you talking about?

A. That contract. I would throw it out of the window.

Q. 356. You repudiate your contract?

A. No, I can't. I would like to. I mean, I would like to modify it.

[fol. 262] Q. 357. You fixed the price back yonder, your company did. Did they think that was a reasonable return for it?

A. Mr. Pope, you must remember when you start a new venture you hope for certain things to happen, and work out a complicated situation to the best of your ability, but you find things you had never experienced at times, it does not work out very well.

Q. 358. And that is exactly the way the representatives of your company looked at it at the time, if the Memphis Power and Light Company was making more money than you people thought they ought to, you were keeping a rope around their necks so that you could participate in the over amount of reasonable profits, weren't you?

A. No, sir.

Q. 359 That is the effect of it, isn't it?

A. I think the whole thing was injected by the City.

Q. 360. The City of Memphis?

A. The City of Memphis.

Q. 361. But I understand this contract was made in New York?

A. The City of Memphis has in contractual settlements that part of it which causes controversial settlements.

Q. 362. When was the contract with the City made?

A. Not the contract with the City, but a part of its agreement provides that the City receives a copy of our contractual settlement each year, and they have a right to [fol. 263] examine our books and see how the thing works out for both sides. As far as we are concerned and as far as the Memphis Power and Light Company is concerned the City watches very closely over this thing. It is a stick for the citizens of Memphis to get lower rates, if we can make sufficient money.

(Recess.)

Q. 363. What effect will the sale of the Memphis Power and Light Company's electrical business in Memphis have on you people?

A. I wish I knew. I wish you would tell me. I don't think anyone knows at the present time. I would like to know. It is kind of tough, except for the home folks.

Q. 364. Now Mr. Johnson, I don't care to pursue this particular part of it, but just a little bit further to see if we can kind of travel along together about this contract. I notice in Section 11 of the contract, Article 11, it reads this way: "If in any contract year (a) the net deficit of both parties for all contract years up to such time, as shown by these statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the Buyer shall have received from the combined net surpluses as shown by such statements, an amount equal to one and one half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the combined net surpluses for such [fol. 264] contract year shall be paid to or retained by the Seller".

The Witness: Don't you want to go on so as to get the full meaning of the paragraph? I mean you are stopping in the middle of the sentence.

Q. 364. Now if that condition does exist——?

The Witness: Are you just stopping at "Seller" in the middle of the sentence?

Q. 365. I am asking you a question.

A. I don't think I can answer the question, based on that.

Q. 366. No, not until I ask if you can't. And there is a surplus after all these conditions have been complied with to be turned over to your company, all the surplus, and unless that is more than sufficient to pay your company for the hazard which it has taken over and above its six per cent, then your company keeps the money, doesn't it, under this contract?

A. The contract speaks for itself, yes.

Q. 367. I am asking you if that is correct?

A. Well, here is the contract. I can't go by anything except the contract, myself, Mr. Pope. I mean, that is the wording of it, right here.

Mr. Pope: Yes.

A. Well, that is my answer.

Q. 368. What would become of that money? Would you keep it?

A: Which company? Don't they keep their part of it?

Q. 369. Who?

[fol. 265] A. The Power and Light Company. We are entitled to earn an amount, as you have stated, which is commensurate with the hazards of the business at its inception. Yes, we receive that money. Any money. Certainly, it is an adjustment of prices of the gas. And after we receive that amount, whatever it may be, then the City forces us, according to the contract, that we use it, any excess, to lower the price of gas.

Q. 370. Provided it is above, in excess of what is adequate recompense to your company for the hazards which it has taken over and above the six per cent?

A. That is right.

Q. 371. And if it is more than enough, then of course as you say the City comes in and forces a reduction of the rates?

A. That is right.

Q. 372. And whether or not you do get yourselves in a position to get that surplus over and above six per cent depends upon whether or not the Memphis Power and Light Company makes that money under this contract, doesn't it?

A. We might make it ourselves without them making it.

Q. 373. Well, depends upon both of you then?

A. To a certain extent, yes.

Q. 374. Suppose your company does not make it, then it could not exist unless the Memphis Power and Light Company makes it, can it?

A. Our company can exist, Mr. Pope, on the method outlined in this contract, because we are allowed our operat- [fol. 266] ing expenses, our taxes, amortization of our investment. That is sufficient to keep us going if we return that amount of money. But this extra money would compensate the people who put up the money, enable them to get a fair return on their investment.

Q. 375. Sure, but I say the realization of that depends upon whether or not the profits exist?

A. Oh, sure.

Q. 376. And the profit cannot exist unless either your company or the Memphis Power and Light Company makes it over and above these other items, can it?

A. That is true.

Q. 377. Then if your company did not make it, it can't exist any other way except by the Memphis Power and Light Company making it, can it?

A. No, we make it anyway. We make enough to take care of amortization of the investment.

Q. 378. I am asking that, come down to the question, this compensation for your hazardness over and above the things you are talking about, you have a chance to make all of those things plus pay for your hazard you have taken?

A. That is right.

Q. 379. But you can only realize on that clause in the contract by either your company or the Memphis Power and Light Company making that excess profit, that is correct, isn't it?

A. I would say so, yes.

[fol. 267] Q. 380. And if your company don't make it, then the only way it could be realized is for the Memphis Power and Light Company to make it, isn't it?

A. It is equivalent to a rate adjustment, yes sir.

Q. 381. Answer my question, please.

A. I said yes, and I am amplifying that; I say it is equivalent to a rate adjustment.

Q. 382. Without any regard to what it may be called by you, I want you to answer my question directly, if your company does not make it over and above these items

you have explained, then the only way you can get it is for the Memphis Power and Light Company to make it?

A. What do you want me to do, answer yes, or no?

Mr. Pope: Yes sir.

A. I think I have a right to explain it——?

Mr. Pope: Yes.

A. I would say yes, but I construe it as being a rate adjustment.

Q. 383. I think I shall ask you one more question and desist. Will you have prepared and file as Exhibit L a statement showing the amount and to whom paid each year 1932, 1933, 1934 and 1935 the management fees that have been paid by your company?

A. That is rather easy to get.

Q. 384. And I assume by that you mean you will file it? [fol. 208] A. On the advice of counsel I will. I don't see any objection.

(Exhibit L.)

Mr. Armstrong: I reserve the right to advise about that. I don't think it is competent. I may be willing to file it anyway, notwithstanding the competency of it, but I am not agreeing to do it. I don't think it is relevant, but I will notify you if I decide not to, so that you can take any steps you desire.

Mr. Pope: Otherwise he will file it?

Mr. Armstrong: Yes sir.

Mr. Pope: That is all.

Redirect examination.

By Mr. Armstrong:

Q. 385. Mr. Johnson, were you ever connected with the Electric Bond & Share Company, or any of its affiliated properties?

A. No sir.

Q. 386. You spoke about Mr. Coyle as taking this matter up with you. Did you know Mr. Coyle before that time?

A. Yes sir.

Q. 387. Where did you know him?

A. I knew him in connection with various bond issues that had purchased properties which he owned—controlled.

Q. 388. Did you know him very well, or not?

A. I knew him only in a business way.

Q. 389. Mr. Pope used the expression with regard to the regulator, referring to the regulator, rather, as altering gas [fol. 269] or changing it. Now does the regulator alter or change the gas in any way?

A. I tried to bring that out to the best of my ability. It simply alters it, as I say, not in its quality. It is only in its pressure.

Q. 390. It does not change the constituent parts of the gas, British Thermal Units?

A. Not in the slightest.

Q. 391. Do you treat this gas at all in any way after you get it out of the ground until you deliver it?

A. No sir.

Q. 392. Mr. Pope said in one of his questions to you if there had been a reduction in gas rates—that was the effect of his question, I will not try to quote his words—that that would necessarily indicate that these requirements in Section Eleven or Twelve or whatever section it is, had been complied with. I will ask you whether or not that is necessarily true or whether or not by mutual consent of all parties you may not have a reduction?

A. I think that this contract, the same as any contract; can be altered or changed by mutual consent of all parties interested.

Q. 393. Do you know, first, whether there has been a reduction or not, of your actual knowledge?

A. I do not, no sir.

Q. 394. If there has been, do you know the circumstances under which it was made?

[fol. 270] A. I do not.

Q. 395. Now why do you use Memphis as the location for your office?

A. Memphis as I stated previously, for convenience. It is a large City. Merely for executive offices, as I stated. But we could operate almost equally as well in Greenville; from the standpoint of operation, no doubt would be better at Greenville than here. And if we could find in Mississippi a City the size of Memphis, I have no doubt we would be down there.

Q. 396. What executive officers have their offices in Memphis?

A. Myself, and Mr. Dearth.

Q. 397. What is his position?

A. Assistant Treasurer and Assistant Secretary.

Q. 398. What other executive officers are there of the Memphis Natural Gas Company?

A. At the present time?

Q. 399. Well, in 1932 to 1935?

A. The officers have changed from time to time, Mr. Armstrong, and I would have to give you what I think, as I remember, recall the officers at that time, if you would like to have them.

Q. 400. Not unless you are certain about it.

A. There was about half a dozen Vice Presidents at that time, and several assistant secretaries and treasurers, none of whom were located in Memphis.

Q. 401. All right. Now what kind of business does the [fol. 271] Memphis Office do, did it do in 1932 to 1935?

A. Memphis takes care of the engineers and the executive offices that are maintained in Memphis.

Q. 402. Where were your customers billed from?

A. All customers are billed from Memphis.

Q. 403. Where were your checks drawn?

A. For payment of our expenses?

Mr. Armstrong: Yes?

A. On the Memphis Banks.

Q. 404. Do you get in your Memphis office reports of your maintenance men, engineers and people of that kind?

A. Reports are sent from along the line to the Memphis office. To the proper office.

Q. 405. All these things, paying your bills, and getting reports and all that; supervising the general business of your company, do they apply equally to that relating to gas delivered to customers in Tennessee as they apply to customers in Mississippi, Arkansas, and Louisiana, do they, or not?

A. Yes sir, applies to all of our business.

Q. 406. Have I described in a general way what your Memphis office did in those matters?

A. Yes sir,

Q. 407. Is there any particular function of the Memphis office except the things I have mentioned?

A. None whatsoever I know of, at the moment.

[fol. 272] Mr. Armstrong: That is all.

Mr. Pope: That is all, except that I want a statement showing the net earnings of the company for the years 1932, 1933, 1934, and 1935, in the State of Tennessee.

Mr. Armstrong: I will be glad to ascertain what that is if I can do if. I will be glad to furnish it to you.

(Exhibit M.)

Further deponent saith not.

(Signature waived.)

Sworn to before me this 14th day of November, 1938. Henry Rawlinson, Notary Public, Shelby County, Tennessee. (Seal.) My Commision expires July 19, 1941.

[fol. 273] IN THE CHANCERY COURT OF DAVIDSON COUNTY.

[Title omitted]

DEPOSITION OF MILTON S. BINSWANGER

[fol. 274] The next witness, MR. MILTON S. BINSWANGER, first being duly sworn, deposed as follows:

Direct examination.

By Mr. Armstrong:

Q. 1. What is your name?
A. Milton S. Binswanger.
Q. 2. Mr. Binswanger, do you live in Memphis?
A. I do.
Q. 3. How long have you lived in Memphis?
A. Thirty one years.
Q. 4. What is your age?
A. Sixty.
Q. 5. What business, other than your connection with the Memphis Natural Gas Company, are you engaged in?
A. I am in the flat glass distributing business.
Q. 6. Wholesale, or retail, or wholesale and retail?
A. Wholesale and retail.
Q. 7. How long have you been engaged in that business?
A. Forty years.

Q. 8. Have you ever held any position with the Memphis Chamber of Commerce, or taken any part in its activities?

A. Yes.

Q. 9. What?

A. I have been a member of the Board of Directors on several occasions, and I likewise in the years 1925 to 1929 was Chairman of the Industrial Division.

[fol. 275] Q. 10. Did the Memphis Chamber of Commerce, or did you individually, have anything to do with the initiation of the movement to bring natural gas to Memphis?

A. Yes.

Q. 11. Just tell us in your own way how the movement originated, and give us a short account of it?

A. Around the year of 1927 a gentleman came to Memphis from Mobile, Alabama, with the purpose in mind of bringing natural gas to Memphis. He sought me out, as being the head of the Industrial Division of the Chamber of Commerce, seeking information as to how his purpose might be accomplished. Felling that the Memphis Power and Light Company was the logical company for organization, either directly or through its affiliates, to bring natural gas to Memphis through pipe lines, as would be necessary, with that end in view I negotiated with Mr. Tutwiler, who was then President of the Memphis Power and Light Company, over a period of more than a year. They continuously opposing the idea, with the attitude, as I so understood, that it would be a very unprofitable venture. Believing the matter to be one of great importance to the City of Memphis I sought the aid of the City Authorities to assist in bringing about sufficient interest in the matter to induce the Power and Light Company to promote the enterprise—that is, the pipe line. The Memphis Power and Light Company still opposed the matter. On refusal of the Power and Light [fol. 276] Company to take any steps to give Memphis the benefit of natural gas, together with the gentleman who had first brought the matter to the attention of Memphis we sought out capital and investors to build this pipe line, and sufficient money was raised through selling bonds and preferred stock, and the issuance of common stock, to build and promote the line with that facility. We then presented it to the City, and they were disposed to even grant a Charter for the building of a distribution system in Memphis——

Q. 12. Let me interrupt you just a minute. You say the

"granting of a charter". Are you referring to a charter, or franchise, which?

A. Franchise, I meant, thank you. Franchise, to distribute gas in the City of Memphis, and naturally the group that was prepared to make the investment in the pipe line for bringing natural gas had every assurance that they could raise this additional money needed. Then with that facility or ability that was clearly demonstrated, the Memphis Power and Light Company agreed to distribute gas in the City of Memphis, and a contract was formulated by the Memphis Natural Gas Company and the Memphis Power and Light Company.

Q. 13. Now Mr. Binswanger, I understood you to say that the first knowledge of this matter came to you through contact with some man from Mobile, did I understand you to say?

A. Mobile, Alabama.

[fol. 277] Q. 14. Who was that, do you mind telling?

A. Mr. Boyles.

Q. 15. What was his argument and connection, do you know?

A. Well, he was a young lawyer that conceived the idea that this was a profitable enterprise, and really brought it to the attention of Memphis as seemingly the logical point for an outlet, with his natural anticipation through that medium he would have an opportunity of making some money.

Q. 16. You spoke of Mr. Tutwiler being President of the Memphis Power and Light Company at that time, what were his initials?

A. T. H. Tutwiler.

Q. 17. Is he now living, or dead?

A. He has passed away.

Q. 18. At that time, when this matter first came to your attention, what was your connection then with the Memphis Chamber of Commerce?

A. I was chairman of the Industrial Division of the Memphis Chamber of Commerce.

Q. 19. What was then the function of the Industrial Division of the Chamber of Commerce?

A. To endeavor to bring new enterprises, do what was possible to develop local enterprises, or to promote anything that would increase the industrial opportunity of Memphis.

Q. 20. Had that division, prior to that time and including that time, and subsequent to that time been active in those things?

[fol. 278] A. Continuously.

Q. 21. Now these efforts to bring natural gas into Memphis, did that, or not, have the active support and backing of the Memphis Chamber of Commerce?

A. Of the Industrial Division.

Q. 22. That was the group charged with that function?

A. Yes, sir, they were charged with that function. And, frankly, not all of the members were active in it, but they supported the activity through its meetings and so forth.

Q. 23. Now prior to the time natural gas was introduced in Memphis what gas service, if any, was supplied, and by whom, to the consumers in Memphis?

A. There was an artificial gas plant for the manufacture of gas which served the public of Memphis, which was confined at that time to practically domestic use such as cooking, and some limited use of it at that time for water heating, and the restaurants used it in a small way as a convenience, and a minimum amount of usage.

Q. 24. Who manufactured and distributed this artificial gas?

A. The Memphis Power and Light Company.

Q. 25. I am not clear whether I understood your answer as to whether the interests that you were working with contemplated at one time not only the construction of a pipe line for bringing natural gas to the City, but also the construction of a distribution system within it?

[fol. 279] A. It was, to the extent that a formal franchise was drawn. Never acted upon by the City Commission, but with the understanding, at least of the promoters of the pipe line, that if an arrangement could not be made with the Memphis Power and Light Company that the franchise would be granted.

Q. 26. Now if the arrangement had not been made with the Memphis Power and Light Company state what would have been the probable result?

A. There would have been a separate and independent company which would have taken over the matter of distribution.

Mr. Pope: Well, of course that answer is incompetent. Purely a conclusion.

Mr. Armstrong: Go ahead and answer. Mr. Pope has a right to make objections, but you answer the questions.

A. (Continuing.) With the end in view that it was highly desirable, even with the understanding of conditions in that day over ten years ago, with a division or entirely different company to perform the function of transporting gas to Memphis, and another company distributing it.

Q. 27. Would there have been, under those circumstances, however, two competing companies distributing, one artificial gas, and one natural gas, in Memphis?

A. I can only say that was contemplated.

Q. 28. Did the Memphis Power and Light Company ever evince any willingness to go into the arrangement, prior to [fol. 280] the time it was threatened with this competition?

A. Definitely opposed it.

Q. 29. During all of these negotiations state whether or not you kept closely in touch with them?

A. Constantly.

Q. 30. And during all that time so far as you know did anyone, any representative of the National Power and Light Company, or the Electric Bond and Share Company, have anything to do with the project of bringing natural gas into Memphis?

A. What was known as a field representative, Mr. H. E. Abele, then and continuing during the time seemingly was charged with that responsibility by associates of the Memphis Power and Light Company, and was in all the negotiations constantly.

Q. 31. The point I was making is whether or not they were active in attempting to bring natural gas, or was he on the same side that Mr. Tutwiler was on?

A. He constantly opposed it and tried to convince the group which he was affiliated with——

Q. Well, to repeat my question, Mr. Binswanger, did anybody representing the National Power and Light Company or the Electric Bond and Share Company have anything to do with initiating the movement, or helping it forward, to bring natural gas?

A. No.

Q. 32. When the arrangement was made with the Mem- [fol. 281] phis Power and Light Company to distribute—and I may say for your information that the contract is in the record—state whether or not the Memphis Natural Gas

Company made any contract for its gas supply at the Monroe Field?

A. It did. And can I go on and explain?

Mr. Armstrong: Yes.

A. Realizing that we could not float the securities necessary to get sufficient money, one of the requisites was to make a contract to have a dependable source for its supply of natural gas, even to the extent of making surveys through engineers as to the immediate capacity at the time, and for how long a period they would in all likelihood be able to serve gas.

Q. 33. Who did you make that contract with?

A. With the Industrial Gas Company.

Q. 34. Now did you, or any of your associates so far as you know, at that time know of any interest that the National Power and Light Company, or the Electric Bond and Share Company had with the Industrial Gas Company? Did you know of it?

A. I knew of no connection whatsoever.

Q. 35. Did any of your associates, so far as you knew?

A. I never heard Electric Bond and Share Company's name mentioned in connection with it.

Q. 36. What about the National Power and Light Company?

A. Nor the National Power and Light Company.

Q. 37. What company was actually organized to transport [fol. 282] the natural gas from the Monroe Field to Memphis?

A. Memphis Natural Gas Company.

Q. 38. That is the complainant in this case, is it?

A. Yes sir.

Q. 39. Now this contract of purchase of gas in the Monroe Field originally made with the Industrial Gas Company, is that the same contract you have today, with the exception that there has been various changes in the other party to the contract? That is, various reorganizations, perhaps, or changes, so far as the Industrial Gas Company is concerned?

A. Due to conditions, as I understand it, in the territory where Natural Gas is found and developed, the producers in that Section, for their account, without any knowledge to us, seemed to make some consolidation of interests there, and the Industrial Gas Company seemingly became a part

of that institution. Subsequently they, of their own accord, without any knowledge of the motive of how they were to do so, then would supply gas to the Memphis Natural Gas Company from several sources. There would have been no justification for us to complain, for it gave us a wider, and safer field or territory from which we were to draw gas, but our contract went on without interruption just as though it was the original contract.

Q. 40. You speak of without any knowledge. You mean knowledge on the part of whom?

A. Memphis Natural Gas Company.

[fol. 283] Q. 41. Mr. Binswanger, after the Memphis Natural Gas Company was incorporated what official connection, if any, did you have with it?

A. I was Chairman of the Board of Directors from its inception through until the summer of 1933. Then elected President of the company, which position I filled until about January 1st 1935.

Q. 42. And after that time?

A. I was elected Chairman of the Board, which position I have held ever since.

Q. 43. Hold it now?

A. And still hold it.

Q. 44. You said since its inception. Can you give us that approximate date?

A. The actual company was organized in the spring of 1928. And went into actual delivery of gas January 1st 1929.

Q. 45. Now Mr. Binswanger, we are particularly interested in investigating operations of the company for the calendar years of 1932, 1933, 1934 and 1935. Were you during all those years, as you have said, either Chairman of the Board or President of the company?

A. I was.

Q. 46. And what change during those years, did the Memphis Natural Gas Company make in its method of operation? I mean, of transporting and delivery of natural gas? Was [fol. 284] it the same all those years?

A. The same all of those years.

Q. 47. What was, during those years, the business of the Memphis Natural Gas Company?

A. Transporting gas from the Monroe Gas Field to Memphis and making deliveries similarly to other companies in Mississippi, Arkansas and Louisiana.

Q. 48. Now confining ourselves to Tennessee and to those years 1932 to 1935 inclusive, what customers did the Memphis Natural Gas Company have, if any, in Tennessee, during those years?

A. Memphis Power and Light Company at Memphis, and I am not positive, but I think right at the end of that period, west Tennessee Power and Light Company.

Q. 49. Now what control, if any, did the Memphis Natural Gas Company have over the natural gas after it delivered it to either the Memphis Power and Light Company or the West Tennessee Power and Light Company?

A. None.

Q. 50. During those years did the Memphis Natural Gas Company have any reservoirs or containers of any kind for gas in the State of Tennessee?

A. None.

Q. 51. Did it during those years use its pipe line for storage purposes in the State at all?

A. Only to the extent necessary for carrying gas from the [fol. 285] field to the point of delivery.

Q. 52. But did it use them for storage purposes to store gas at all?

A. No sir. Never considered as such.

Q. 53. At what pressure did the Memphis Natural Gas Company deliver that gas, for instance to the Memphis Power and Light Company, in those years?

A. We had an obligation and a contract to deliver it at 100 pounds pressure at the respective gates.

Q. 54. Now you say one hundred pounds pressure. Did the Memphis Power and Light Company put it out in its distribution lines throughout the City and for its customers at the same pressure?

A. For a practical application and distribution that would be impossible.

Q. 55. Why?

A. Because the local system of distribution system are not constructed to carry a pressure anywhere near approaching the delivery pressure.

Q. 56. Well, please give us some idea, without attempting to be too definite, about what pressure gas is when it reaches the consumer—for instance, household purposes?

A. Well, if you take household gas, I doubt that they deliver it at over from one half to one and one half pounds pressure.

Q. 57. The reduction of pressure, if any, between one hundred pounds at which you deliver to the Memphis Power [fol. 286] and Light Company, and the reduced pressure at which it delivers it to its consumers, was done by whom?

A. The Memphis Power and Light Company.

Q. 58. Now during the years mentioned—and in my questions I am always relating the questions to those particular years—did the Memphis Natural Gas Company have any operation in Tennessee—I mean, operate any compressor station anywhere?

A. We had a compressor station, but it was not operating.

Q. 59. And where was that compressor station?

A. About two miles east of the Brooks Avenue Station.

Q. 60. Near Memphis?

A. Right at Memphis.

Q. 61. How did it happen that they had a compressor station and did not operate it in those years?

A. In building the West Tennessee line it was anticipated that the amount would be substantially larger than it ever developed, and the amount not coming up to expectations, the net capacity and pressure we had in the line at our Brooks avenue station enabled us to deliver this gas at sufficient pressure at its several outlets in West Tennessee without usage of that power plant.

Q. 62. In other words, you did not need it?

A. No need for it.

Q. 63. During those years the natural gas which was transported from the Monroe field to Memphis and on up [fol. 287] into West Tennessee, was that gas in constant flow in your pipes all those years?

A. Must be, or we could not have delivered it.

Q. 64. Did you, or not, have compressor stations during those years in other States than Tennessee?

A. We did.

Q. 65. Now in connection with the transportation and delivery of this natural gas to the Memphis Power and Light Company and the West Tennessee Power and Light Company state how you determined, if you did determine, the amount of natural gas you delivered to the Memphis Power and Light Company and the West Tennessee Power and Light Company?

A. We had meters set at the Brooks avenue station to measure it as it passed through.

Q. 66. Was that a separate undertaking of the Memphis Natural Gas Company, or was that simply incident to your transportation and delivery?

A. It was a necessary function of the Memphis Power and Light Company, or they would not have known what they were delivering.

Q. 67. You say a necessary function of "The Memphis Power and Light Company"?

A. I mean, of Memphis Natural Gas Company.

Q. 68. Was that a separate undertaking, or merely incident to your transportation?

A. It was incidental to the transportation.

Q. 69. Now then in your own pipe lines, did the gas come [fol. 288] up through your pipe line at a greater or lesser pressure than one hundred pounds, which was the pressure at which you delivered it to the Memphis Power and Light Company?

A. It would come to Memphis in varying pressures. Generally brought it from our intake at Guthrie, Louisiana, at about four hundred pounds pressure, which naturally would be reduced until it reached the point of delivery. Our contract was to deliver it at a pressure not less than one hundred pounds. But it would vary from that low minimum, one hundred, to maybe, at times we had a pressure of 180 to 200 pounds at the Brooks avenue station as it affected our system.

Q. 70. You refer to the Brooks avenue station. I will ask you whether or not that is the main delivery point for the Memphis Power and Light Company?

A. The main delivery point so far as any delivery into Tennessee.

Q. 71. That is what I mean. When the gas reached the Brooks avenue station at a high pressure, at the 180, what if anything did the Memphis Natural Gas Company do to reduce the pressure so as to be able to deliver it at one hundred?

A. We have equipment there enabling us to reduce the pressure—the Memphis Natural Gas Company—and deliver it at 100 pounds or thereabouts to the Memphis Power and Light Company.

Q. 72. Is that a separate undertaking, or was that merely incidental, to enable you to deliver?

A. Merely incidental to our operations.

[fol. 289] Q. 73. Would the Memphis Natural Gas Company during those years have had any use for either the apparatus reducing the pressure, or the metering, except as it relates to the transportation from Monroe, Louisiana, through Louisiana and Mississippi and Tennessee, and delivery of this gas—have any other use for them at all?

A. No.

Q. 74. Now during those years did the Memphis Natural Gas Company maintain an office in Memphis, or not?

A. We had an office here, yes sir.

Q. 75. Under the laws of what State is the Memphis Natural Gas Company, incorporated?

A. Delaware.

Q. 76. Where are most of the directors meetings of the Memphis Natural Gas Company held?

A. New York City.

Q. 77. It's office in Memphis, just what, generally speaking, did it do in those years?

A. It represented for the most part an operation office, but so far as their functions were concerned they were decisions of the directors in their meetings held at New York City.

Q. 78. And state whether or not its operations, so far as an operating proposition was concerned, was dealing with the entire line of the Memphis Natural Gas Company, or Tennessee alone?

A. Dealt with all of the operations of the Memphis Natu-
[fol. 290] ral Gas Company.

Q. 79. Could the same thing have been done at an office in Arkansas, Louisiana, Mississippi, or elsewhere, as far as that is concerned?

A. Without any difficulty.

Q. 80. State whether or not that maintaining an office in Memphis during these years was an entirely separate thing, or merely incidental to the sale and distribution of the gas?

A. It was merely for the distribution of the gas, largely.

Q. 81. Mr. Binswanger, during the time that you were President of the company how frequently were you in the office of the company?

A. Daily.

Q. 82. And during the time you have been chairman of the Board, both before your Presidency and subsequent to that, how frequently have you been in the office?

A. Oh, several times a week. Sometimes spend an hour, sometimes spend several hours, but I was in constant touch with it over the telephone.

Q. 83. Can you state that during the years 1932 to 1935 inclusive you were thoroughly familiar with the operations and methods of operation of the company?

A. I was. I would like to make a slight correction—I said several times a week; when I was in the City, I meant. For I had to make occasional trips on business out of the City.

Q. 84. That is, when you were in town?

A. Yes sir.

[fol. 291] Q. 85. Mr. Binswanger, do you recall what investment house was concerned in floating the issue of securities of the Memphis Natural Gas Company?

A. P. W. Chapman & Company of New York, and Carmen, Snyder & Company of Chicago.

Q. 86. Did either one of those concerns at that time or prior to that time or subsequent to that time so far as you know have any connection with Memphis Power and Light Company or the National Power and Light Company, or Electric Bond and Share Company?

A. Not to my knowledge.

Q. 87. In other words, so far as you know did any company connected with the Electric Bond and Share company group have anything to do with the bringing of natural gas to Memphis, except the contract which you finally made with the Memphis Power and Light Company for distribution of the gas?

A. None, and the contracts were made under the greatest pressure.

Q. 88. Pressure applied on whom?

A. On the Memphis Power and Light Company.

Q. 89. Was it, or not, at all times, reluctant to go into it?

A. Most reluctant.

Q. 90. What has been your record of attendance—I don't mean in detail, but generally speaking, upon meetings of the Board of Directors of Memphis Natural Gas Company?

A. During that period of time I do not think there was a single directors meeting held which I did not attend.

[fol. 292] Q. 91. So far as you know, and basing it on your experience as an executive officer and a member of the Board of Directors during those years, or any other time so far as that is concerned, has there ever been any attempt by either the Memphis Power and Light Company,

or the National Power and Light Company, or Electric Bond and Share Company, or any of their affiliates, to influence the action of the Memphis Natural Gas Company?

A. None whatsoever.

Q. 92. Did they have any control or influence in any of its affairs at all?

A. Never exercised any, and I knew of none.

Q. 93. Mr. Binswanger, is there any matter I have not covered that you want to state?

A. No, I know of none.

Mr. Armstrong: Take the witness.

Cross-examination.

By Mr. Pope:

Q. 94. Mr. Binswanger, if I understand you, you were interested in negotiations which resulted in bringing natural gas to Memphis, from their inception?

A. Yes.

Q. 95. And continued on through until the present day?

A. Yes, sir.

Q. 96. At that time the Memphis Power and Light Com- [fol. 293] pany was an existing corporation and operating a public utility in the City of Memphis?

A. Yes, sir.

Q. 97. This company was furnishing to its customers gas that was manufactured by it in Memphis?

A. Up to the time the Memphis Natural Gas Company brought natural gas to Memphis.

Q. 98. Yes, and at the time, of course, that the negotiations started for the purpose of bringing natural gas?

A. Immediately preceding that.

Q. 99. Well, I say at that very time they were engaged, this company here was engaged in furnishing manufactured gas to its customers?

A. During the negotiations for bringing natural gas to Memphis.

Q. 100. The Memphis Power and Light Company, as I understand you, did not take very well at that time to the proposition of surrendering its business of furnishing manufactured gas, for natural gas?

A. No.

Q. 101. But disregarding the views of the Memphis Power and Light Company at that time, you and your associates proceeded to try to bring about the introduction of natural gas into Memphis?

A. We did.

Q. 102. And I take it had numerous conferences with officers representing the Memphis Power and Light Com-
[fol. 294] pany leading up to the final contract?

A. Yes, sir.

Q. 103. Now when and where was the first meeting held after your friend from Alabama that you spoke of came to Memphis, in which you participated?

A. In the Memphis Power and Light Company office at Third and Madison.

Q. 104. Now after you had gotten along to the point where it looked like you were going to succeed in putting over your project of bringing natural gas, and negotiating for the terms and conditions of the contract between natural gas and Memphis Power and Light, who was present at that meeting?

A. Well, the attorneys representing the Memphis Natural Gas Company; representatives from the Memphis Power and Light Company's local office; there were attorneys from New York; Mr. Abele, who was advisor to the Memphis Power and Light Company here, who was connected with the Electric Bond and Share Company; Mr. H. G. Scott——

Q. 105. Pardon me, is that Mr. H. C. Abele?

A. Yes. Who recently passed away. Mr. H. G. Scott of New York, who was then President of the Memphis Natural Gas Company. Engineers for the Memphis Natural Gas Company, and engineers for the Memphis Power and Light Company. Quite a large conference, when the final negotiations were about to be completed.

Q. 106. What other companies was Mr. H. C. Abele a
[fol. 295] director or officer of?

A. He was connected I think with the Public Service of New Orleans. Maybe many others, so far as I know.

Q. 107. What was his connection, if any, with the National Power and Light Company?

A. Dealing, so far as I know, with the Memphis Power and Light Company, he probably, in turn, had connections in an advisory capacity or interest. My recollection is that Mr. Abele had some official capacity or was a Vice-Presi-

dent of the Electric Bond and Share Company, and was known as the man in charge of general operations of particular interest to the Electric Bond and Share interests in Memphis and other similar territories.

Q. 108. And the National Power and Light Company was owned one hundred per cent by Electric Bond and Share Company, was it not?

A. I have no knowledge of that, sir. I don't know. In fact I had no relations that I knew of by such title as the National Power and Light Company. I had only one objective so far as my individual services were rendered, which was to deal with the Memphis Power and Light Company.

Q. 109. Well, the Memphis Power and Light Company was owned practically entirely by the National Power and Light Company, wasn't it?

A. I had no knowledge at that time of that. In more recent years——

Q. 110. (Interrupting:) Have you any knowledge of it now?

[fol. 296] A. I don't know what percentage they own of it.

Q. 111. You do know they are interested in it?

A. I do, just from newspaper reports.

Q. 112. Well, you know it from financial reports, don't you?

A. And from financial reports, that they own, as I understand substantially all of the common stock of it.

Q. 113. About 99%, isn't it?

A. I could not answer that. I don't know that definitely.

Q. 114. Well, in that connection the National Power and Light Company also owns 100% of the West Tennessee Power and Light Company, does it not, common stock?

A. I do not know to what extent they are interested in that, sir.

Q. 115. But you do know they are interested?

A. Only by rumor. I have never been told directly.

Q. 116. Who else besides Mr. Abele that had connection with the Electric Bond and Share Company, or the National Power and Light Company, took part in these negotiations that you have talked about?

A. So far as my knowledge goes only Mr. Abele and their attorneys from New York that might have been associated with, and who were associated—I will go that far—with Mr. Abele in his Official capacity.

Q. 117. Now in the beginning of these negotiations Mr. Abele and the representatives of these other concerns that [fol. 297] you have described were opposed to this project of bringing natural gas to Memphis as I understand?

A. Even to the extent of practically a fist fight between Mr. Abele and myself on one occasion in an effort to have him understand the needs of Memphis, and in his doubting statements made that this enterprise, the Memphis Natural Gas Company bringing natural gas to Memphis, would save this community an amount of over six hundred thousand dollars a year. The biggest of the then existing demands. And that probably with that great reduction the Memphis Power and Light Company were fearful of the outcome, with so definite a reduction in their income.

Q. 118. Well, you did not have the fight, did you?

A. We had a fight to get them to accept it.

Q. 119. I say, you did not have the fist fight?

A. Well, I will only say by the kindness of some friends the result of actual fighting did not occur. But it was so close to it I hope I never get into such an altercation with you.

Q. 120. Well, I can outrun you. Did the type and character contract that was made between the two companies have anything to do with—concessions made both ways, I assume?

A. As is natural under such negotiations, yes, sir.

Q. 121. The contract that was finally made dated May 24th, 1928, or in fact two contracts were made on the same day, were they not?

A. Yes, sir.

[fol. 298] Q. 122. One was for the sale of natural gas to the Memphis Power and Light Company for distribution, and the other for consumption?

A. Use in the power house, one contract.

Q. 123. Well, that was consumption, was it not?

A. Well, it was consumed, certainly.

Q. 124. In the contract that has been termed as the distribution contract your company was obligated to deliver natural gas to the Memphis Power and Light Company at a certain point at not less than one hundred pounds pressure, per inch, I take it that means?

A. That is a technical term for it, yes, sir.

Q. 125. And your company undertook to comply with that contract, I assume?

A. And did so.

Q. 126. And did comply with it?

A. Yes, sir. With one interruption only, when we had a break in the line which lasted maybe two or three hours.

Q. 127. Where was that break?

A. Down in Mississippi near Tunica.

Q. 128. The price that was to be paid to the natural gas company by the Memphis Power and Light Company was determined by the use to which the Memphis Power and Light Company sold the gas for, wasn't it?

A. As is customary in all contracts of that nature so far [fol. 299] as I have read and know of several of them.

Q. 129. Now please answer my question. That is true, is it not?

A. Yes, sir.

Q. 130. The Memphis Power and Light Company delivered this gas to the users or consumers in and around the City of Memphis in some five different classifications as provided by the contract?

A. I think it is five. I am not sure as to the exact number.

Q. 131. And the amount that was initially paid to the natural gas company depended entirely upon the report made to it by the Memphis Power and Light Company of the quantities of gas sold and delivered in the different classifications?

A. Necessarily so, because it could not have ever been possible to have secured sufficient volume of sales unless the schedule of rates were built whereby they could take in all types of business, based largely on the quantities they sold.

Q. 132. Now Mr. Bluswanger, I am going to ask you to please answer my questions directly, and then make such explanation as you care to?

A. Yes, sir. I will try to.

Q. 133. These prices ranged all the way from seventy-five cents per thousand cubic feet of gas down to thirteen and a fraction per thousand cubic feet in the contract, did they not?

A. You refer to the prices we charged, or the prices the public paid?

Q. 134. I am talking of the amount that the Memphis [fol. 300] Power and Light Company paid your company initially for the gas delivered to it?

A. No, we had no rate so high as seventy-five cents. We had one at the initial steps, the maximum I think on domestic gas of thirty-five cents.

Mr. Armstrong: Of course we object to that line of questioning on the ground that the contract speaks for itself.

Q. 135. I probably did not make my question clear. What I meant to ask you was that the gas that the Memphis Power and Light Company sold for seventy-five cents and higher—that was the highest gas price that you received?

A. The Memphis Natural Gas Company sold no gas at these prices. The Memphis Power and Light Company did.

Q. 136. That is exactly what I asked you. That there was one classification in the contract which provided that all gas that was sold by the Memphis Power and Light Company for seventy-five cents per thousand cubic feet or more, that amount of gas your company received its highest price for gas delivered?

A. On the highest price that the Memphis Power and Light Company sold was the same type of gas that we sold them at a higher price.

Q. 137. And the highest price, was it not?

A. I cannot answer that exactly as you put it, for they did have a bracket in the Memphis Power and Light Company that was naturally higher than seventy-five cents, for what [fol. 301] is termed minimum usage.

Q. 138. That was for cooking and heating purposes?

A. Yes, sir, ran up as high as $1.05.

Q. 139. And on that particular classification of gas the Memphis Natural Gas Company received its highest price?

A. On such gas as they sold for that purpose, yes sir.

Q. 140. And then on down the line until it finally reached the unaccounted for gas, which was the lowest?

A. Yes, sir.

Q. 141. Five different classifications?

A. Yes, sir.

Q. 142. The only means that your company had under the contract and by your practice of determining the amount of money that your company was to receive for gas delivered to the Memphis Power and Light Company, was the reports of the Memphis Power and Light Company as to the different amounts of gas sold by it in these different classifications?

A. Yes. But following your statement to me that I am permitted to explain that——?

Mr. Pope: Sure.

A. (Continuing) In order that a financial basis from which we were to receive our payment for gas, which was a common and accepted practice in the gas business wherever natural gas is sold anywhere in the United States——

Q. 143. (Interrupting) Said practice set up and put into [fol. 302] effect by the Electric Bond and Share Company?

A. I don't think it is confined to the Electric Bond and Share. It is the custom among all companies, and they are not the only company—we had to have some basis upon which to establish a return to the Memphis Natural Gas Company. And this contract was made with the knowledge of the fact we had to get sufficient volume of business in order to carry enough gas through the distribution line to justify the cost of gas, expenses, and operations, and all incidents to cost. That without such an agreement there would have been no opportunity for the City of Memphis, its public, to have enjoyed the benefits and usage of natural gas and consequent monetary saving.

Q. 144. Now if I understand you your controlling interest in promoting this plan was to aid and assist Memphis?

A. That was my motive, yes, sir, originally, at its inception. But I would like to explain, so that I am not misunderstood. After the Memphis Power and Light Company, which would not undertake this for the benefit of the public of Memphis, it became necessary to get outside capital beyond the City of Memphis to build this transportation line, and I think it is consistent to say despite a great deal of efforts that I personally put upon this matter or this development, even with the opportunity of receiving compensation for my services, I never accepted one penny, paid my own expenses, which run into several thousand dollars, and when the company was finally formed, having had faith in it, I bought and paid for such interest as I then owned and [fol. 303] own to this date in large part. Paid more than that same stock that I owned, common stock, could have been sold for on the public market to anyone, nor could they have gotten any offer, because it was a very hazardous investment.

Q. 145. Now Mr. Binswanger, so that we will not unnecessarily——?

A. (Interrupting) But I want to make that clear, sir, since you brought up a question as to my original motive.

Q. 146. So that we will not have to repeat your motives anymore we will just assume that you were thoroughly patriotic?

A. I am not more so than the average person.

Q. 147. I am speaking about these particular things—not trying to profit, yourself——?

A. No, sir.

Q. 148. You were interested in getting natural gas to the consuming public of Memphis?

A. I will say this, that I did profit, all due to the fact of management under most strenuous conditions in which I did play a small part.

Q. 149. Now please answer my last question.

A. What is your last question? May I ask that it be repeated?

(The Reporter thereupon read from his notes.)

Q. 150. You were interested in getting natural gas to the consuming public of Memphis?

A. I was, and again repeat, when one is forced to seek outside capital; having faith in the enterprise which I had [fol. 304] advocated so insistently, I expressed that appreciation practically by purchase, for cash, and paid for any interest that I had at that time secured, or subsequently.

Q. 151. Who was it in these negotiations or conferences that suggested the sections of the contract with reference to two companies, Memphis Natural Gas Company and Memphis Power and Light Company, of each year making settlements between themselves by which the excessive dividends, if any, would be divided as provided by the contract and/or the deficit of either or both would be distributed between the two?

A. I am not in possession of definite knowledge as to exactly who initiated it, but it emanated largely from the Memphis Power and Light Company, but for a different reason which the question involves. It was done for the purpose of the Memphis Power and Light Company having less faith in the success of the enterprise, that they might insure themselves against the least loss that might obtain, and an unwilling participation on the part of Memphis Natural Gas Company to make such an arrangement in that

they were independent of any interest in the management of their operation—the Memphis Natural Gas Company—and had no particular control as to how the Memphis Power and Light Company operated. We could control our own affairs, but were very skeptical about what might be the type of management under some other institution in which we had no voice in their management, and no way to control their expenditures.

[fol. 305] Q. 152. But you ultimately conceded and agreed to it and signed the contract to that effect?

A. Yes.

Q. 153. What was Mr. H. C. Abele's attitude with reference to that clause in the contract?

A. Well, Mr. Abele has passed on, but he had the thoughts as I personally interposed that possibly by the injection of that principle, the Memphis Natural Gas Company might forego their efforts and abandon their project, and as a matter of expediency as customary in business, that condition was accepted.

Q. 154. Upon the insistence of Mr. H. C. Abele?

A. I would not say by the insistence, except that he would not go ahead with it, which practically means the same thing, without that was involved.

Q. 155. At that time he was Vice President of National Power and Light Company?

A. I did not so understand, I thought he was with Electric Bond and Share Company.

Q. 156. Well, Electric Bond and Share, which owns the National Power and Light?

A. I have no knowledge of that, sir.

Q. 157. You have knowledge that he was connected with that company, I believe you said?

A. I knew he was connected with Electric Bond and Share at that time.

[fol. 306] Q. 158. Well now, digressing for a moment, why was it that you people who had originated this idea of bringing natural gas here, and had pressed it to a conclusion, did not feel able to manage the company?

A. If we had attempted to have secured all the expert knowledge incident to operating a company of the size it would have put a substantial burden of undetermined cost, and we accepted the matter of management by an official company so organized with the end in view that we felt that we would get expert knowledge, making it more of an as-

sured success, and it was done purely as a business matter, as you would use judgment in other similar situations.

Mr. Armstrong: Well, I confess I don't understand either the question or the answer.

(The question and the answer were both thereupon read by the Reporter.)

Mr. Armstrong: In asking your question did you mean to ask the witness why they did not feel capable of going ahead and organizing a distributing company to distribute gas, or didn't feel able of managing the Memphis Natural Gas Company which they had organized——? I just don't understand it.

Mr. Pope: Well, my language seems to be plain, but I will say that what I meant was the fact that they made a contract with another company to manage their own affairs.

Mr. Armstrong: You mean, to manage the affairs of the [fol. 307] Memphis Natural Gas Company?

Mr. Pope: Yes sir.

Mr. Armstrong: To what company do you refer?

Q. 159. What company did you make that contract with?

A. It was many years ago that that was made.

Q. 160. It is still in existence, isn't it?

A. No, not that company that we originally made it with.

Q. 161. A successor to that company still is your manager, is it not?

A. I think it was the Utilities Gas and Management Company of New York.

Q. 162. You have your contract of management now with the Commonwealth Gas Company, do you not or Gas Corporation?

A. Yes, sir.

Q. 163. And that is a successor of the one you originally made it with?

A. Yes, they purchased that company, I understand.

Q. 164. And that management contract has existed from the beginning of your company throughout all the years covered by this lawsuit?

A. Yes, sir.

Q. 165. And up to now?

A. Yes sir.

Q. 166. This company that you first made it with, what was its connection with Electric Bond and Share Company?
[fol. 308] A. None whatever, sir.

Q. 167. Whose idea was that, who brought about that contract, in your group?

A. The officers of the Memphis Natural Gas Company.

Q. 168. Did Mr. Abele have anything to do with it?

A. None whatever, no, sir.

Q. 169. Well, how did you know they were competent managers?

A. Well, through inquiry, and opportunity of discussing the facilities with the institution we discussed it with; on the advice of the engineers who had designed the line; we accepted it with the best knowledge we had at the time as being competent.

Q. 170. Now as a matter of fact the only service they rendered you during all these years was about one third of the time of Mr. Wallace?

A. No, there was a great many other services rendered. From time to time we have had to do refinancing. From time to time we have had to get expert knowledge as to whether the line would justify this expenditure, or that expenditure. They had to have officers there who were competent to advise us in numerous capacities, sir.

Q. 171. Why didn't you elect a President or Chairman of the Board who had that knowledge?

A. For the reason that one man would hardly contain sufficient knowledge that would be necessary from several [fol. 309] sources. One man could hardly serve us in all these various capacities.

Q. 172. What is it that is so intricate and technical about transportation of natural gas, after your pipe lines are built?

A. Well, there are many functions that I might say, as it is with other institutions. They seem quite simple to the outsider, but sometimes become very much more intricate to even those individuals when the various ramifications or operations develop.

Q. 173. Do you know the amount of these management fees you have paid each year?

A. Yes sir, it is based on the percentage of volume of business.

Q. 174. What is that percentage?

A. Well, it varies. Don't keep to exact figures. It begins up at about two per cent of a certain figure, and running on up, and graduating down according to the volume done.

Q. 175. Will you procure, if you do not have the figures available from the books and records of Memphis Natural Gas Company, the amount of annual management fees that have been paid during the years 1932, 1933, 1934 and 1935, and file them with this deposition?

A. I will be very glad to.

Mr. Armstrong: I will reserve the same objection on that.

Q. 176. Your company has been criticised by the auditors for paying these high fees, management fees, has it not?

A. I never heard of an auditor criticising it.

[fol. 310] Q. 177. What about engineers?

A. No engineers.

Q. 178. Do you know Messrs. Lucas and Luick, in Chicago?

A. I have read of their names in the paper in connection with some City study of the gas situation. I have never had any personal contact with them at all.

Q. 179. Didn't they make a report on September 22nd 1933 and criticise these management fees as too high?

A. I am not in position to answer that. I read something in the paper about making a report. I have no knowledge of it.

Q. 180. Who employed them?

A. The City of Memphis, so far as I know.

Q. 181. Was H. C. Abele a Director in the Memphis Natural Gas Company?

A. He was in the early years a director, but I would not be positive that he was a director during that period of 1932 to 1935 inclusive. I would not say definitely.

Q. 182. But he was in the inception of it—that is, when this contract was first executed?

A. Yes, sir.

Q. 183. He was also at that time——?

A. (Continuing:) I don't recall his ever attending a directors meeting.

Q. 184. But he was a director of that?

[fol. 311] A. He was a director but having no voice in the management, he did not exercise it.

Q. 185. At the same time he was a director of your company and this contract was made he was chairman of the

Board of Directors of the Memphis Power and Light Company, wasn't he?

A. I could not answer that definitely.

Q. 186. Are you sure? Just think about it.

A. I don't know that he was; he may have been, but there was no occasion for me to inquire into that, because we were absolutely independent of that so far as our operations were concerned.

Q. 187. It looks to me like, instead of being independent you were indeed very dependent?

A. Only to the extent of the volume of business they got. The more business they did, the more volume we got.

Q. 188. And you had to take their word for it as to the classifications when you went to settle with them?

A. They were subject to our inspection and reading the meters just as they did themselves.

Q. 189. But you did not read them, did you?

A. I would not say that we did not. Just like an auditor will check up books, they will take a cross section of it, won't attempt to check every item, but will just check it from time to time.

Q. 190. Now at the time of these first meetings that you are talking about was the minutes kept of those meetings? [fol. 312] A. Yes sir.

Q. 191. Are they available?

A. I think some, most of them probably are in our New York office. There may be copies of some of them here, sir.

Q. 192. Are they stenographic reports of the meetings?

A. They were, the secretary made his usual notes and motions were written down verbatim, all actions were recorded verbatim, and then subsequently transcribed to the usual form, and read by the directors, and for many years each director signed them, those that were present.

Q. 193. Were there any minutes kept of those meetings or conferences before the corporation was organized?

A. I know of none, sir. They were largely verbal until we got down to the final negotiations.

Q. 194. Will you procure and file a copy of the minutes that were made of the directors meetings at the time the contract was agreed upon?

A. I will make every effort to do so. I am quite sure it is available. I could not say that definitely, but I will make every conscientious effort. (Exhibit A.)

Q. 195. Now you as a member, chairman of the Board of Directors, and President of the company I believe you said for about two years——?

A. About a year and a half.

Q. 196. A year and a half—all of the other times, from [fol. 313] the time the company was organized up to now, you were Chairman of the Board?

A. Yes, sir.

Q. 197. And I believe you said that you went to the office here at Memphis in your official capacity from four to five times a week when you were in Memphis?

A. Approximately so.

Q. 198. And I take it you were in Memphis a very large percentage of your time?

A. Yes, sir.

Q. 199. Why was it necessary for you to go to the office so often?

A. Well, I would say probably what might be termed by some excess interest in the success of the Memphis Natural Gas. Probably many days my functions there, or what I did, was to go and look at the record sheets to see how much business they had done, and compare it to the previous year's corresponding date to see whether we were progressing or not, that I might be informed when I attended directors meetings; that I could keep them informed to the extent of my ability as to what was advisable or inadvisable.

Q. 200. In other words, performing your official duties and looking after the business of the company as an aggressive man would do?

A. It was not extensive locally except in the—you must recognize I had not my own purse involved at that time, [fol. 314] but I had pride in the success of the Memphis Natural Gas Company. And probably my attendance there was largely to see that the operations were going on normally.

Q. 201. How often did your Board of Directors meet?

A. Probably in 1932 and 1933 we may have met—I would say four or five times a year. Subsequently we changed to quarterly meetings, and with a maximum of four times a year, and I occasionally made trips to New York to confer with the company's directors there.

Q. 202. How many directors live in New York?

A. Generally speaking there has been a majority *to* the directors lived in New York, or beyond Memphis; they were not all from New York.

Q. 203. What other individuals are and have been members of the Board of Directors of Memphis Natural Gas and Memphis Power and Light Company besides Mr. Abele?

A. I don't know of any others, sir, that was a director in the Memphis Power and Light Company at that time being a member of our board.

Q. 204. Is Mr. Armstrong, your chief attorney, a member of your board?

A. Yes, sir.

Q. 205. Isn't he also a member of the Memphis Power and Light Company Board?

A. I don't know whether he is a director there, or not. [fol. 315] I know he is counsel there, but I do not know whether he was a Director. I cannot answer that.

Q. 206. What about Mr. O. H. Simonds, or Simmons?

A. Simonds; he was President of the Memphis Natural Gas Company for a short period, and during that period he had no connection with the Memphis Power and Light Company, nor Electric Bond and Share,—during the period of service with the Memphis Natural Gas Company.

Q. 207. Are you stating that as a fact, or just opinion?

A. It is definite advice that was given to me at the time he was elected President.

Q. 208. Why were you inquiring?

A. Because we had a definite reason. We were trying to maintain an independent company.

Q. 209. Well, for the year 1928 when this contract was executed, and the year 1929, to refresh your memory I will ask you if he was not a director in both companies, Mr. O. H. Simonds?

A. Yes, I think he was, yes, sir.

Q. 210. Well, that is what I asked you awhile ago. I thought you misunderstood my question.

A. Well, I didn't misunderstand it, but I thought you had reference to the time he was president.

Q. 211. No, I asked you if he was not a director?

A. He was a director, yes sir.

Q. 212. In both companies at the time the contract was made?

[fol. 316] A. I misunderstood you about Memphis Natural. Whether he was a director in Electric Bond and Share, I don't know.

Q. 213. I am not asking about Electric Bond and Share. I am asking about Memphis Natural and Memphis Power and Light?

A. I knew he came here frequently. Whether he was an officer or director I cannot answer definitely.

Q. 214. You know he was interested in Memphis Power and Light Company?

A. Yes sir, he seemed to have succeeded in the service that Mr. H. C. Abele was rendering to the Memphis Power and Light Company.

Q. 215. Will you procure a copy, or rather the names of the Board of Directors of the Memphis Natural Gas Company and Memphis Power and Light Company for the years 1928 and 1929 and file it as a part of your deposition? (Exhibits B-1 and B-2.)

A. I can give it to you definitely, those of the Memphis Natural Gas Company. I am willing to make reasonable effort to secure the others, but I have no right to demand it.

Q. 216. There would be no occasion for their refusing to furnish it to you, would there?

A. No, sir.

Q. 217. You are on friendly terms with them?

A. Know them very well, and our relations have been pleasant, as you want them to be with all customers.

Q. 218. Now you speak in your original testimony of your [fol. 317] efforts to bring about the consummation of this project to bring natural gas to Memphis, told of the troubles that you had, and that you finally had made financial arrangements successfully to put it over, and among other things said that you had raised the money by bond issue, and so forth. Now first there could have been no bond issue floated until after this contract had been made, could there, Mr. Binswanger?

A. It was predicated on our ability to make such a contract.

Q. 219. You had the promise, then, of it?

A. Yes, sir.

Q. 220. And whom did you say handled the financing?

A. P. W. Chapman & Company of New York and Carman, Snyder and Company of Chicago.

Q. 221. What was the original bond issue?

A. 6,300,000.00 dollars.

Q. 222. On what basis did they finance it?

A. You mean, as to compensation, or what? They bought the bonds from the Memphis Natural Gas Company at, I think, 90 which was the common basis of those bonds, and sold them to the public for whatever they could get for them. I don't know what it was.

Q. 223. What rate of interest?

A. Those bonds bore six per cent interest.

Q. 224. Did they get any gratuities?

A. They sold a million dollars worth of preferred stock, [fol. 318] and I think with that preferred stock they got some common stock in connection with it, as an inducement to finance a secondary security.

Q. 225. How much common stock did they get?

A. I don't know how much they individually or collectively got. I could not answer that. A substantial amount, I would say that. It was not worth a great deal *of* the time. It was just what it could be made to earn.

Q. 226. Well, you thought it was worth enough to pay your money for it, didn't you?

A. I certainly did. My judgment was worth something, and I would have put something into it, the ability of myself and others to make it worth something.

Q. 227. And you have received a fair return on it since that?

A. I have, sir, yes sir.

Q. 228. Do you know the amount of authorized common stock of the Memphis Natural Gas Company?

A. There is a million shares authorized, and nine hundred eighteen thousand six hundred fourteen, I think, or approximately that amount issued.

Q. 229. Of which approximately fifty per cent belong to the commonwealth Gas Corporation?

A. Exact figure is around forty seven per cent, yes sir.

Q. 230. 47.99, is it not, to be exact?

A. That may be the exact figures. I don't carry that in [fol. 319] my mind, that closely.

Q. 231. Now the Commonwealth Gas Corporation also owns the West Virginia Gas Corporation, doesn't it?

A. Yes, sir.

Q. 232. And what is the connection between the West Virginia Gas Corporation and the Memphis Natural Gas Company?

A. None whatever, sir, except that the Memphis Natural Gas Company did find an opportunity of making an investment of some of their reserve in the funds of the West Virginia Corporation. We have no control whatsoever over their company, none.

Q. 233. There is a note executed from your company to the West Virginia Company, is there not?

A. Executed from our company to the West Virginia Company?

Q. 234. Yes, $470,000.00?

A. No, sir, we never executed any.

Q. 235. From the West Virginia Company to yours, then?

A. Not existing now, sir. Might have been during that period.

Q. 236. Well, was there?

A. Yes, there was a note issued.

Q. 237. What was that note for?

A. Borrowed money from it.

Q. 238. From your company?

A. Yes sir, paying a small interest. We had the money and wanted an investment.

Q. 239. Did that money you loaned to this West Virginia [fol. 320] Company represent profits—it did, I assume, on your business?

A. Not necessarily. We must have made money, accumulated that money, but we had operated on a very meagre return, and by conserving its resources and not paying it out all at once we had accumulated a surplus fund, and then we had a certain amount of money we would accumulate in the way of what we termed depreciation charges, and that resulted in a substantial amount of money.

Q. 240. Your purpose was to depreciate so that would pay for the whole plant in fifteen years, was it not?

A. Twenty-five.

Q. 241. Twenty-five—doesn't the contract say fifteen?

A. Our contract?

Q. 242. Yes sir, with Memphis Power and Light Company?

A. I don't think that is correct, sir, because we would have been operating differently.

Q. 243. The contract will show, of course, what securities you took from the West Virginia Company for the loan?

A. Their note, sir.

Q. 244. Just a plain note?

A. Yes, sir, at that time.

Q. 245. No security or collateral?

A. Not at that time. Subsequently we demanded security.

Q. 246. Who suggested that you make that loan?

A. That is difficult for me to recall just who made the [fol. 321] suggestion. It was made by some one of the directors getting up in the meeting and calling our attention to the opportunity of using our idle funds which were not drawing any interest or return on the idle funds. I could not definitely state just which one, I did not record that in my memory.

Q. 247. Wasn't it a rather peculiar sort of circumstance to you that it would be suggested that it be loaned to the West Virginia Corporation that was owned by Commonwealth Gas Corporation that owned fifty per cent, practically, of that stock?

A. Well, it probably might have had that inference, but we took time enough to get the statement of the company and investigate it. I did that of my own account to find out whether the loan was in my judgment secure, and spent much time in analyzing their statement.

Q. 248. That has been paid?

A. That note has been paid.

Q. 249. Is there any other in existence now?

A. No notes, no, sir.

Q. 250. Anything else?

A. Well, we own now certain bonds issued on the property of the West Virginia Gas Corporation.

Q. 251. How come you with those bonds?

A. We again found it a matter of good investment. They have assets over three times, in our judgment, all the amount of those bonds that are issued. We don't own them all.

[fol. 322] Q. 252. Why didn't you buy City bonds, municipal bonds, or Government Bonds?

A. Well, that is merely a matter of people's judgment. Whether they think the security is good enough to justify the difference in the income that would be involved in a situation of that kind.

Q. 253. Now your company has a contract with the Arkansas Power and Light Company, does it not?

A. Yes, sir.

Q. 254. To furnish gas?

A. Yes sir.

Q. 255. Also Mississippi Power and Light Company?

A. Yes sir.

Q. 256. And also the Louisiana Power and Light Company?

A. Yes sir.

Q. 257. All three of which is 100% owned by the Electric Bond and Share Company, isn't it?

A. I don't know that, sir.

Q. 258. You don't know that?

A. No, sir.

Q. 259. Do you know they own a good portion of the stock?

A. I would not know whether they own any of it, or all of it. I have heard by rumor that they are interested. There was never an occasion for me to inquire.

Q. 260. I will ask you if in 1928, at the time that this con- [fol. 323] tract was made between your company and the Memphis Power and Light Company, if there was not twenty-five per cent of the stock in your company owned by the Electric Power and Light Company which was one hundred per cent owned by Electric Bond and Share?

A. I can answer that they owned 25%, of the then issued common stock. They were interested to that extent. Whether it was National Power and Light or Electric Power and Light, or what ownership they have in each other, I have no knowledge of that fact.

Q. 261. But you do know Electric Power and Light Owned 25% of the outstanding stock of your company at that time?

A. I stated that I did not know whether it was in the name of Electric Power and Light or National Power and Light.

Q. 262. But one or the other?

A. One or the other, yes.

Q. 263. The Memphis Natural Gas Company pays some tax in Pennsylvania, doesn't it?

A. Memphis Natural Gas Company pay tax in Pennsylvania?

Mr. Pope: Yes sir.

A. I have no knowledge of that, sir.

Q. 264. Well, could it be paid without your knowing it?

A. Well, matters of that limited importance could happen. I don't say that I would go down into the details that far, sir,

Q. 265. Is it not true that the Memphis Natural Gas Com-
[fol. 324] pany pays a tax in the State of Pennsylvania of four mills for the resident stockholders in your company that are in Pennsylvania?

A. If that happens, I don't think it is paid by our company. It may be by the individuals owning the stock. I don't know anything of that sort. I have never seen any entry of that character on the books.

Q. 266. You are familiar with Poore's financial report, are you not?

A. I have heard of it. I don't know it intimately.

Q. 267. And that is accepted as authoritative in the financial world, is it not?

A. I understand it is, yes, sir.

Q. 268. Did the Arkansas Power and Light Company hold a note against your company at any time?

A. It did, yes, sir.

Q. 269. How much was that?

A. One hundred twenty thousand dollars.

Q. 270. What was that for?

A. The Arkansas Power and Light Company felt that they had an opportunity of retailing gas in the State of Arkansas in a section, I think, in the vicinity of Lake Village, Arkansas. Our company at that period did not feel it had the financial ability to expend that amount of money for the necessary pipe lines involved, and they stated, for
[fol. 325] their own benefit, that they would advance $120,000.00 to be paid out, I think the actual payment date was 1944, final payment date on that, with the opportunity possibly of increasing our outlet for gas we assumed that obligation. We furnished the money. We assumed the obligation and got the benefit of any——

Q. 271. (Interrupting:) Who owns the pipe lines?

A. Memphis Natural Gas Company.

Q. 272. How long is it?

A. Not a long line. I would say that line probably may be from twenty-five to thirty miles long. Somewhere in the neighborhood.

Q. 273. Have you paid the note?

A. Yes sir. Recently, in the last year, I think last year we paid it.

Q. 274. Was any of the money used in building the West Tennessee Pipe line?

A. No connection with it whatsoever.

Q. 275. You also had an outstanding note in 1932 of $178,297.00?

A. Yes sir.

Q. 276. Who was the holder of that note?

A. Mississippi Power and Light Company.

Q. 277. Was that incurred the same way?

A. Under similar conditions. They wanted to extend their line from our main line down to Greenwood, Mississippi. We again found ourselves in those days with in-
[fol. 326] adequate funds to invest, and they advanced the money, taking our note for it, which was subsequently paid.

Q. 278. And in 1933 you had $166,446.00 outstanding notes, did you not?

A. I don't know of that, sir. I don't know what that refers to.

Q. 279. Do you remember one in 1934 of $153,870.00?

A. I can't recall that note there. If you will tell me what it was, it may refresh my memory.

Q. 280. When did you pay the first note off, the $178,297.00?

A. I think it was paid in 1936. I am not exactly sure as to that time, but I think it was.

Q. 281. Then these notes I have just mentioned for 1933 and 1934 could possibly be some credit or some reduction in that note?

A. Yes, they may have been payments on account and it was reduced to that extent.

Q. 282. Those notes were held by whom?

A. As far as I knew, Mississippi Power and Light Company. What they did with it, I have no knowledge.

Q. 283. I mean, to whom did you execute them?

A. In Mississippi to the Mississippi Power and Light Company. In Arkansas to the Arkansas Power and Light Company.

Q. 284. You- company makes a financial statement each year and publishes it, does it not?

A. Yes, sir.

[fol. 327] Q. 285. Those statements are now available?

A. Copies of them are on file, yes, sir, in our office.

Q. 286. I am going to ask you to please file that covering the years 1932, 1933, 1934 and 1935?

A. I think we have copies of them available.

(Exhibits C-1-5 inc.)

Q. 287. And 1936. I have in my hands now the published annual report for the year 1937 that Mr. Johnson, the President of your company, or Mr. Wallace, on- or the other, furnished me when their depositions were taken some weeks ago. I will ask you if you will please file that—first identify it whether it is the published annual statement, and then file it as Exhibit C to your deposition?

A. This is a copy of the 1937 annual report, sir, of the Memphis Natural Gas Company.

Q. 288. And will you please file it as Exhibit C to your deposition?

A. I will be glad to. (Exhibit C.)

Q. 289. These other annual reports that I have asked you to file, please make the one for 1932 Exhibit C (1) and on through the alphabet, including 1936, as Exhibits?

A. Yes, sir. (Exhibit C 1-5 Inc.)

Q. 290. Your company in 1935 or 1936 bought some oil leases, did it not?

A. Yes sir.

Mr. Armstrong: Now I object to going into that for the [fol. 328] reason that it — further encumbering the record at this time, and I am going to instruct the witness, as company's counsel, not to answer this question. Not that we have any objection to giving you the facts, but it has no bearing on the case, and is subsequent to the time here involved.

Q. 291. You bought those from Mr. H. E. Abele, didn't you?

A Not to my knowledge, no sir.

Q. 292. Who did you buy them from?

A. We bought them from the Highland Gas and Oil Corporation of Houston, Texas.

Q. 293. And as an investment I assume?

A. I think my counsel——

Mr. Armstrong: That is all right. I have no objection to your answering, although it hasn't anything to do with this case.

A. Yes, sir, I think that is right.

Q. 294. Who is the Certified Public Accountant that audits your books each year?

Mr. Armstrong: You mean that audited them in 1932, 1933, 1934 and 1935?

Mr. Pope: Yes sir.

A. Mr. W. A. Clater.

Q. 295. Do you happen to know that *is* is the Official Auditor of the Commonwealth Gas Corporation also?

A. I know that he was during that period, yes, sir.

[fol. 329] Q. 296. That is what I am asking you about.

A. Yes sir.

Q. 297. Now are you familiar with the contract between Memphis Natural Gas Company and the Industrial Gas Corporation for the purchase of gas?

A. More or less, yes.

Q. 298. Is, or not, the same provisions in that contract that there is between your company and the Memphis Power and Light Company with reference to your annual settlements, contractual settlements?

A. No, sir, not to my knowledge. I never recall reading it. May I explain—our contract is a flat rate for gas, regardless of what it is used for.

Q. 299. That provision in either of the contracts between your company and the Arkansas Power and Light Company, Mississippi Power and Light Company, and the Louisiana Company?

A. I think in the Mississippi Company there is a provision as to Industrial gas only, that we share, we get for our gas a percentage of what they sell for in Mississippi only.

Q. 300. I am talking of your annual contractual settlements, Mr. Binswanger?

A. Well now, there is, if you refer as it relates to the Memphis Power and Light Company, but not as to our sources of supply of gas.

Q. 301. I don't think you understand my question.

[fol. 330] A. Probably not, sir.

Q. 302. I take it you are familiar with Section Eleven of the contract between your company and the Memphis Power and Light Company that provides for an annual contractual settlement?

A. Yes sir.

Q. 303. In addition to the price you are to get for it?

A. Yes sir.

Q. 304. Now what I am asking you is whether that clause as contained in Section 11 in the Memphis contract is in either one of those other State company contracts?

A. Not to my knowledge, sir.

Q. 305. Is there any provision similar to that in either of those contracts by which you share, in either the profits or the deficits?

A. No—in the total operations, sir?

Mr. Pope: Yes sir.

A. None whatever, to my knowledge.

Q. 306. Well, you would know about it, if there was one, wouldn't you?

A. In all probability.

Q. 307. Now these contracts that were made between your company and the Memphis Power and Light Company, the Arkansas Power and Light Company, the Mississippi Power and Light Company, and the Louisiana Power and Light Company, were all made at the same time, were they not?

A. Approximately the same.

[fol. 331] Q. 308. Were either of these other State companies, Arkansas, Mississippi, Louisiana, furnishing manufactured gas to their constituents at the time you made these contracts with them?

A. I don't think they were doing so at the time they made the contracts. I know that the Mississippi Power and Light Company subsequently took on industrial contracts, but I have no recollection of any definite contracts that either of the other companies made of that character, sir.

Q. 309. I think you again misunderstood my question. I am asking whether or not they were selling their consumers the manufactured gas at the time you made a contract to furnish natural gas?

A. I don't think so, no sir.

Q. 310. Now you received this gas, if I understand you, in the field, at a pressure of about four hundred pounds to the inch?

A. No, not necessarily. We receive it at varying pressures. Sometimes it gets down as low as 120 pounds. We take it into our compressors at Guthrie, Louisiana, and compress it, and endeavor to forward it North.

Q. 311. And as it extends in the pipe line, the tendency is to reduce its pressure, I assume?

A. Yes sir.

Q. 312. And you have to boost it up every once in a while?

A. Yes sir.

Q. 313. Now where is that last boosting station—I will [fol. 332] call it, I don't know any other good name——?

A. The furthermost northerly one that we were operating during that period was Tunica, Mississippi.

Q. 314. How far is that from Memphis?

A. I think it is a matter of about forty to fifty miles.

Q. 315. Now you built one, if I understand you, in Shelby County, out of Memphis, and never used it?

A. As far as I know it was never used for pumping gas.

Q. 316. But you did build it?

A. It was built, yes sir.

Q. 317. How far is that from your point of delivery to the Memphis Power and Light Company?

A. Oh, a matter of two or three miles.

Q. 318. When was it built?

A. Built the year we put in the West Tennessee Line, which I think was around 1932. I am not positive as to that year.

Q. 319. Has it been dismantled?

A. Yes, sir.

Q. 320. You found that your gas arrived at the points of delivery in Shelby County at sufficient pressure for all practical purposes without this boosting point?

A. Yes sir.

Q. 321. And as a matter of fact——?

A. (Interrupting) Point of delivery to the West Tennessee Power and Light Company.

[fol. 333] Q. 322. And also point of delivery to the Memphis Power and Light Company?

A. And Memphis Power and Light Company, yes sir.

Q. 323. And it arrived at the points you deliver to the Memphis Power and Light Company—that is, the points, because you deliver at several points, don't you?

A. To the Memphis Power and Light Company, only one point. But the West Tennessee Power and Light, to several points.

Q. 324. Well now, aren't you mistaken about only one point to the Memphis Power and Light Company?

A. I know of only one point.

Q. 325. Isn't there several places along your line down here you deliver to the Memphis Power and Light Company for their communities other than Memphis?

A. We may have some offtake in some small parts, but I don't know—yes, I think maybe down at Whitehaven, or

somewhere out in the outskirts of town, maybe, but they are minor, of no great importance.

Q. 326. As a matter of fact, to refresh your recollection, isn't there four or five of those places?

A. Yes, there may be of that nature, but they are of the same character as the take-off at Brooks avenue station.

Q. 327. Well, the take-offs are all of the same character, aren't they?

A. Yes sir.

Q. 328. As a matter of fact you deliver it at several dif-
[fol. 334] ferent points to the Memphis Power and Light Company—isn't that a fact?

A. Yes sir, they have several intakes, the Memphis Power and Light Company.

Q. 329. Now this gas arrives at these points of delivery at a high pressure, if I understand it, to be delivered into their what you term take-off pipe lines. How do you get the pressure down to the correct pressure?

A. That is a function of reducing it after we deliver it to the Memphis Power and Light Company. They have no doubt their instruments there and equipment for the reducing. But they do that; we have nothing to do with it.

Q. 330. You don't reduce the pressure at the point of delivery?

A. No, sir, there would be no way for us to do it.

Q. 331. What is the reason there is not?

A. Because we have no equipment for that purpose beyond our one hundred pounds.

Q. 332. Which would know more about that, you, or Mr. Wallace?

A. Mr. Wallace would know a great deal more than I do.

Q. 333. Then, if he said there was equipment there to reduce that pressure, he is more likely to be correct, isn't he?

A. Mr. Wallace may have referred to the fact that if it were involved for any emergency or other reason that we had to reduce the pressure, that we could have done so. But it was not a requirement of facility, except as a precautionary measure.

(Off the record discussion.)

[fol. 335] Q. 334. Then I will ask you again, since the suggestion has been made by Mr. Armstrong that you are mistaken with reference to that being so, just make your explanation?

A. Memphis Natural Gas Company in its own lines have for transporting gas, wherever there was an intake from West Tennessee Power and Light Company, we had facilities to reduce the gas down to one hundred pounds, and naturally had to have that, because there was not always a definiteness as to what exact pressure would go up through the lines.

Q. 335. Well, that also applies to the gas you delivered to the Memphis Power and Light Company, too, doesn't it?

A. Yes sir.

Q. 336. You have two contracts with Memphis Power and Light Company, don't you?

A. Yes sir.

Q. 337. One known in the record as the distribution contract, and the other the consumption contract, used at their own power plant?

A. We have a contract to deliver them gas which they use in their power plant.

Q. 338. How does that gas get from your pipe line to the central plant of the Memphis Power and Light Company where it is consumed?

A. As I understand it is taken to what is called—the Memphis Power and Light Company has a separate line, a twenty-two inch line that runs from the Brooks avenue [fol. 336] station to the Memphis Power and Light Company's Kansas Street station, and then from there on they reduce it to the standard as they want to reduce it. And all delivered under one line, our Brooks avenue station through the Memphis Power and Light Company's lines.

Q. 339. How is the pressure of natural gas reduced, by what process?

A. Well, it is merely as you would take a faucet through which water is run along valves, and they open an inch, or decrease, as the necessity may require it. It is a valve process to permit just so much to pass through to the extent of the opening in the valve.

Q. 340. Mechanical equipment?

A. Mechanical equipment.

Q. 341. And that mechanical equipment is installed on the inside of the main pipe line, is it?

A. It is a part of the main pipe line, yes sir, our main pipe line.

Q. 342. It comes up to that mechanical equipment at we will say a certain pressure, for instance from 180 to 300

pounds per inch, and comes out on the other side reduced to 100 or whatever you want to make it?

A. Yes sir.

Q. 343. That is what you have at your intersections of the pipe line in Memphis where gas is delivered to the [fol. 337] Memphis Power and Light Company or rather, in Shelby County to the West Tennessee Power and Light Company?

A. Yes sir.

Q. 344. What are the BTU's of this gas that you actually receive when you receive it?

A. That varies from 960 BTU to probably 985. Sometimes it might run in excess of that, but that is substantially what it is when tests have been made by our company.

Q. 345. Do you reduce that?

A. No sir.

Q. 346. You don't change that?

A. No, sir. Whatever it comes to us, we deliver it.

Q. 347. Your contract, if I remember correctly, calls for an minimum of 600, isn't it?

A. No. In excess of that, sir. I think it is around 950, in that neighborhood.

(Recess.)

Q. 348. Has this contract that has been filed bearing date of May 24th 1928 between your company and the Memphis Power and Light Company ever been changed?

A. Not in form. I think there was some slight changes in rates, due to reductions in the City having required certain reductions in our contract at the reduced rates we have to share with it.

Q. 349. Now soon after your company was organized——?

A. (Interrupting:) Pardon me, by that sharing, I mean, [fol. 338] we had to reduce our rates to the extent of what they were to reduce them to the public. To the same extent.

Q. 350. Your company filed a copy of its contract with the Railroad and Public Utilities Commission of Tennessee, did it not?

A. Yes sir.

Q. 351. Well, I notice, having that contract which you filed with the Public Utilities Commission——?

A. (Interrupting:) I say, I am not sure on that point. I had the impression—I would not be positive, that we filed a report.

Q. 352. (Continuing:) In Section 9 of the contract filed with the Public Utilities Commission—that is, the consumption contract—with the Memphis Power and Light Company, there seems to be one whole paragraph in that contract that is not in the one you filed at all with reference to the pressure, pounds of pressure that the gas was to be delivered. Was it stricken out of the contract, or how come that in there?

A. I am unfamiliar with that.

Q. 353. You are not familiar with that change, if it was made?

A. No, sir. I had nothing to do with the filing of any reports of that kind.

Q. 354. Can you state offhand the amounts of dividends that have been paid to the holders of common stock in your company the different years covered?

[fol. 339] A. I could not do that without reference to the records. I have some idea of it, but not sufficient to make a definite statement.

Q. 355. Will you please procure a statement of the amount of dividends that have been paid to the common stockholders by your company from 1930 to 1938, both inclusive, and file it as an exhibit to your deposition?

Exhibit D.

A. I will try to.

Q. 356. The stock par value is five dollars per share, isn't it?

A. Yes sir.

Q. 357. Since when?

A. That was changed back in 1929, I think, or at the end of 1928—at the end of 1929, I think is when that change was made.

Q. 358. There was at first no par?

A. Yes sir, no par at its inception, yes sir.

Q. 359. The question I asked you a moment ago with reference to the dividends paid the common stockholders for the years designated I meant the amounts per each share?

A. Yes sir.

Q. 360. It has just been called to my attention by Mr. Armstrong that the amount of dividends for preferred stock and common stock is shown in the financial statement filed Exhibit to your deposition?

A. Yes sir.

[fol. 340] Q. 361. These figures set out in that financial report you feel sure are correct, don't you?

A. Yes sir.

Q. 362. And those figures only go to the aggregate amounts paid. What I would like to have is the amount paid per share.

The Witness: May I look at that a minute, sir?

Mr. Pope: Yes sir. (Document handed to the witness.)

Q. 363. You stated formerly in your cross-examination that in 1928 and 1929, or at the time this contract was made between the two companies that the Electric Bond and Share Company owned 25% of the stock of your company. How did that company acquire or procure that 25% of the stock?

A. I stated I didn't know whether it was the Electric Power and Light Company or the National Power and Light Company. I think that was a result of a negotiation incident to making the contract here in the distribution of gas.

Q. 364. They were awarded that much of the common stock?

A. Yes sir.

Q. 365. Without paying any price for it?

A. Well, in dollars, no. But in principal support of our original negotiations, yes.

Q. 366. In other words that 25% of your common stock was awarded to either Electric Power and Light Company or the National Power and Light Company as promotion, or assistance in promotion of the proposition?

[fol. 341] A. I would not say that exactly. It was in the form or nature of an insurance to them that if there be earnings sufficient in the Memphis Natural Gas operations, and they were to suffer any loss through their own operations, they would, in turn, probably get back dividends or earnings sufficient to offset losses they thought possible.

Q. 367. Then the effect or result of that would be of course that the Memphis Power and Light Company holders or owners would profit to the extent of 25% of your common stock, when this contract was made, whatever that profit might be?

A. Whoever owned that stock would get the benefit of any earnings that were available to the common stock.

Q. 368. And that was a part of the consideration of the making of the contract with the Memphis Power and Light Company and your company?

A. Yes sir.

Q. 369. Mr. Binswanger, under the contract which has been filed as Exhibit A to the deposition of Mr. Johnson heretofore taken, I am sure you are familiar with Section 9 that provides for the seller to file with the buyer and with the City of Memphis a statement of its business during that year. Setting out in the contract some eight different things to be shown in that statement. Also in Section 10 of the contract the same type and character of statement is required to be filed with the seller and the City of Memphis by the Buyer——?

[fol. 342] A. Yes, sir.

Q. 370. You are familiar with those two sections, are you?

A. Yes sir, more or less.

Q. 371. I will ask you whether or not those statements each year for the years 1932, 1933, 1934 and 1935, have been prepared and filed as the contract provides?

A. Yes, sir.

Q. 372. Your company has copies of those statements, does it?

A. I would be sure they have. They are supposed to have them.

Q. 374. I will ask you to please procure and file a copy of those statements for each of the years above referred to covered by this litigation as Exhibits consecutively to your deposition?

A. I will make every reasonable effort to do so.

Mr. Armstrong: I will say, Mr. Pope, if we have extra copies we will furnish them, but if they have to be copied it would have to be at the expense of the defendant. I think we probably have extra copies.

(Off the record discussion.)

Mr. Pope: I am now asking, if you do not have copies, to file the originals, which are in your possession?

Mr. Armstrong: I object to that on the part of the company. They are part of our permanent records, and cannot go out of the office. I have no objection to exhibiting them to you, but I do object to filing them as a part of the record in this case.

[fol. 343] Q. 375. Then under Section 11 of the contract it provides for an annual settlement between the two parties based upon the two statements filed under Sections 9 and 10?

A. Yes, sir.

Q. 376. What has been termed in this lawsuit as contractual settlements?

A. Yes, sir.

Q. 377. I will get you to please file also, if you will, copies of each years settlements made between the two companies, based upon these sections?

A. I will make every reasonable effort.

Mr. Armstrong: I make the same statement on the part of the company, if we have extra copies we will be glad to file them. We will be glad to exhibit the originals to you, but if copies have to be prepared we will be glad to have them prepared at the expense of the defendant.

Q. 378. If you do not have copies of these—you have stated that you do have the originals, and I am therefore asking you to file the originals as exhibits to your deposition, if you do not have the copies?

Mr. Armstrong: I object to that on the part of the company because they are part of our permanent records and the company is entitled to possession of them. I will be glad to exhibit them to counsel.

Mr. Pope: That is all for the present.

[fol. 344] Redirect examination.

By Mr. Armstrong:

Q. 379. Mr. Binswanger, you were asked by Mr. Pope when the first meeting was held after the gentleman from Mobile, Alabama, saw you and you replied in the office of the Memphis Power and Light Company. I now ask you whether you meant the first meeting relative to the contract on behalf of the Memphis Power and Light Company, or the conference relative to the possibility of bringing natural gas to Memphis, which are you talking about?

A. The first conference was held at the office of the Chamber of Commerce, the one with Mr. Boyles, as to the possibility of gas being brought to Memphis. And from there,

subsequently, the meetings with the Memphis Power and Light Company trying to induce them to do it, were in the Memphis Power and Light Company offices.

Q. 380. Then when you referred to the meeting as being held in the Memphis Power and Light Company's office you were talking about the first meeting that related to the part the Memphis Power and Light Company was to play in the situation, is that right?

A. Exactly so.

Mr. Pope: The defendant objects to this question because it is leading.

Q. 381. Now during these negotiations what attorneys represented the Memphis Natural Gas Company?

A. Mr. W. D. Kyser; Mr. Phil Canale; Mr. M. E. Lesser.

[fol. 345] Q. 382. Did any of those gentlemen at that time have any connection of any kind or character with the Memphis Power and Light Company, or any of the Electric Bond and Share Company group?

A. No, sir.

Q. 383. Mr. Lesser I believe was your brother-in-law?

A. Yes, sir.

Q. 384. Did he have any connection with either company at that time?

A. No, sir.

Q. 385. When the natural gas was brought to Memphis state how the rates charged for natural gas when the Memphis Power and Light Company began distributing it compared with the rates, the Memphis Power and Light Company had theretofore charged for artificial or manufactured gas?

A. The reduction was in excess of thirty three and one third per cent of the then existing rates. And that, when you take it in dollars, the rates might have been slightly different, but not quite that reduction. But the value and the B T U's of the natural gas being so much greater than artificial gas, you did get a savings to the public, dollar for dollar of 33 and one third per cent in saving to the community, and $600,000.00 on the volume of gas consumed, at its inception.

Q. 386. Six hundred thousand dollars in what period of time?

A. A year.

[fol. 346] Q. 387. When you talk about B T U's—I suppose the court is entirely familiar with it, but let's get it in the record. What do you mean by B T U's?

A. That is known as British Thermal Units.

Q. 388. What does it measure, velocity, heating power, or what?

A. It measures the heating power.

Q. 389. All right. Now is natural gas of the kind you deliver to the Memphis Power and Light Company, has it more heating power per cubic foot than the artificial gas the Memphis Power and Light Company had theretofore distributed, or less, or what?

A. More.

Q. 390. Now then I didn't quite understand from your cross examination when you were asked about it, whether or not you first made an attempt to get the Memphis Power and Light Company to build the pipe lines. Did you, or not?

A. We certainly did.

Q. 391. What happened about that?

A. They declined and refused to do it.

Q. 392. Now under this management contract with the Commonwealth Gas Company, you have told it generally speaking and I think in enough detail the nature of the services. Now could you obtain those same services elsewhere for any appreciable lower amount?

A. Not appreciably lower, no. Substantially so.

[fol. 347] Q. 393. And if you had to build up an organization of your own to do that kind of work as fully and completely as it is now done for you under the management contract, would, or not, the cost be substantially the same?

A. Yes sir, or higher.

Q. 394. What have you to say as to whether you did or did not get value received for the services rendered under this management contract?

A. We got value received for what we paid.

Q. 395. How many executive officers has the Memphis Natural Gas Company?

A. Only two.

Q. 396. Who are they?

A. Mr. Johnson as President and I as Chairman of the Board.

Q. 397. By the way, is your preferred stock still outstanding?

A. Up to recently. Just recently retired.

Q. 398. When was it retired?

A. November of 1938.

Q. 399. Are your bonds outstanding?

A. No bonds outstanding.

Q. 400. When were they retired?

A. They were retired, oh, back in 1929. Through the efforts of the Commonwealth Gas Company then existing and the management company in New York. They sold for the benefit of the Memphis Natural Gas Company three hun- [fol. 348] dred eighteen thousand shares of that stock for $19.40 per share. Memphis Natural Gas Company used that money to retire all of its bond issues.

Q. 401. Did they make any extra charge for the service?

A. None whatever.

Q. 402. So the bonds have been paid?

A. Yes sir.

Q. 403. Do you know Mr.—did you know Mr. Joseph Newberger in his lifetime?

A. Very intimately.

Q. 404. Did he leave any bequest in his will, or make any gift prior to his death by which a cup should be awarded annually here in Memphis for the most noteworthy unselfish service during the year?

A. He did, and it existed for many years and is still in existence.

Q. 405. Now I will ask you, if your modesty would permit you to answer, whether or not that cup was ever awarded to you?

A. It was.

Q. 406. Do you remember what year?

A. I think it was the year 1929.

Q. 407. And did your participation in the bringing of natural gas to Memphis have anything to do with the award, and if so what?

A. That was so stated at the time of the award by the people who presented it.

Q. 408. Mr. Binswanger, now do you know of your own [fol. 349] knowledge whether Mr. Simonds was ever a Director of both of the Memphis Power and Light Company and the Memphis Natural Gas Company at the same time? Do you know that, or not?

A. I could not state that definitely.

Q. 409. When was your first loan to the West Virginia Gas Company made, if you know?

A. I don't think we made any loans there earlier than 1937, or certainly not earlier than the fall of 1936.

Q. 410. Now I will ask you to examine the records of the company and supply, in answer to this question, the date when your first loan to the West Virginia Gas Company was made?

A. I will be glad to.

Q. 411. I will ask you whether or not when the first loan was made, and the subsequent loans which were evidenced by notes of West Virginia Gas Company, there was any understanding or agreement that later first mortgage bonds were to be used to take up that loan?

A. Not as any definite agreement. There might have been some casual talk about it, but not any definite agreement.

Q. 412. At any rate the loan has been paid off?

A. Yes sir.

Q. 413. Now then speaking of the Mississippi Power and Light Company and the Arkansas Power and Light Company and the Louisiana Power and Light Company, state whether or not there are any other companies other than [fol. 350] those which serve as distributors in the territory in which your pipe line runs from Monroe to Memphis? Are they the only ones that serve that territory?

A. Yes sir, they are the only ones.

Q. 414. Then in trading with them you were selling some of your gas as it came on its way up, is that the idea?

A. That is right. And cost of transporting.

Q. 415. What did you say this loan of $120,000.00 that the Arkansas Power and Light Company made you was used for?

A. The Arkansas Power and Light Company wanted to increase its retail distribution of gas in certain cities in Arkansas. They had no facilities of their own to pipe the gas there, so they entered into an agreement with us whereby if we would build the pipe line for the transportation of gas up to the cities they wanted to tap onto the line, that they would loan the Memphis Natural Gas Company one hundred and twenty thousand dollars, which was the cost of building that line, and on what was then known as a long time loan maturing in the year 1944.

Q. 416. Well, for what purpose was the money you got actually used?

A. For the building of the lines solely.

Q. 417. Is that one of your main pipe lines? I mean, a main line pipe line?

A. It was not. It was an off-shoot.

[fol. 351] Q. 418. But it was part of your transportation system?

A. Yes sir, it was the same type of line, but just an off-shoot.

Q. 419. Mr. Pope has asked you about some oil leases, or property in Texas. As far as you know did Mr. Abele or anybody connected with the National Power and Light Company, the Electric Bond and Share Company, or the Memphis Power and Light Company have anything to do with that transaction at all?

A. No, sir.

Q. 420. You stated in your cross examination that the last compressor stations, northernmost compressor station on the line of the Memphis Natural Gas Company was at Tunica Mississippi. Are you correct about that, or was it Benoit?

A. Yes, it is at Benoit. I am in error in that.

Q. 421. How far south of Memphis is Benoit, if you know?

A. Benoit, Mississippi, a matter of I will say 90 to 100 miles.

Q. 422. Now then there was a compressor station that was built and never used. What direction is that from the Brooks avenue delivery point to the Memphis Power and Light Company?

A. I would say slightly northeast.

Q. 423. And was that to be used in connection with the sale to the Memphis Power and Light Company, or West Tennessee Power and Light Company?

A. It had no connection with the Memphis Power and Light Company. It was designed solely for facilitating de-[fol. 352] liveries to the West Tennessee Power and Light Company.

Q. 424. Now Mr. Pope referred to a contract between the Memphis Power and Light Company and the Memphis Natural Gas Company as having been filed with the Railroad and Public Utilities Commission in Tennessee by the Memphis Natural Gas Company. Do you know whether the Memphis Natural Gas Company filed that, or the Memphis Power and Light Company?

A. I could not say positively that, either. I do not recall ever reading any report that the Memphis Natural Gas Company ever filed with it.

Q. 425. Has the Public Utilities Commission of Tennessee ever exercised any jurisdiction or attempted to regulate the rates, or regulated the rates of Memphis Natural Gas Company in any way?

A. Not to my knowledge.

Q. 426. If your bonds had not been liquidated what would have been the effect on the possibility of dividends, to your company?

A. Well, it not only would have precluded the declaring of any dividends, but might have involved serious financial difficulties in order to meet bond requirements themselves.

Q. 427. Were they outstanding at the time the National Power and Light Company or Electric Power and Light Company as the case may be acquired its common stock in the Memphis Natural Gas Company?

A. I think that in the usual course we had retired prob-[fol. 353] ably one hundred thousand dollars of those bonds prior to the retirement of the whole issue.

Q. 428. According to your best recollection state whether or not the entire bond issue was, or was not outstanding at the time the National Power and Light Company or the Electric Bond and Share Company, as the case may be, acquired its common stock?

A. It was.

Q. 429. I understood you to say in response to Mr. Pope's question that at the time the National Power and Light Company or the Electric Power and Light Company as the case may be acquired its common stock in the Memphis Natural Gas Company that the amount it acquired amounted to twenty-five per cent of the common stock that was outstanding?

A. Yes, of the original issue.

Q. 430. What percentage of it has it now?

A. The number of shares of stock remains the same as initially secured and now would represent about 16%.

Mr. Armstrong: That is all.

Recross-examination.

By Mr. Pope:

Q. 431. The contract between your company and the Memphis Power and Light Company covering the gas used at the power plant consumed by the Memphis Power and Light

Company; the third Section thereof, provides as to how this [fol. 354] gas shall be delivered and measured. Was that Section of the contract lived up to in the delivery of natural gas to this company for consumption?

A. Yes sir, to my best knowledge and belief.

Q. 432. Well, then, the Memphis Natural Gas Company has a meter at the point of intersection of the Memphis Power and Light Company and your line for measuring gas that goes into its line—that is right, is it not?

A. I do not know whether that meter is right at the Brooks avenue station, or whether they have it at their intake, but it is at one end, or the other. There must be.

Q. 433. Well, how do you determine the amount of gas used for consumption by the Memphis Power and Light Company?

A. They have meters for that purpose.

Q. 434. This contract provides that your company shall install the meters and own the meters?

A. We have for our count in the way of delivery; yes sir. But they also take their own records on that.

Q. 435. Who owns the meters?

A. We own the meters, the delivery meters. If they have theirs, which I am quite sure they have, I have never been to the Kansas avenue station—if they have any there we never paid for them, and have no connection with them.

Q. 436. Mr. Binswanger, what I am asking about, as I understand this contract you delivered this gas to the Memphis Power and Light Company to be consumed at its cen- [fol. 355] tral plant on a pressure of 14.65 pounds per square inch?

A. No, if we did it is not to my knowledge. The reduction is made by the Power and Light Company, so far as I know.

Q. 437. The contract reads, a portion of Section 3 and on the fourth page as follows:

"For the purpose of measurements, the Natural gas deliverable hereunder shall be assumed to obey Hoyle's Law and the average absolute atmospheric (barometric) pressure shall be assumed to be 14.65 pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time"——?

A. That means barometric pressure, but it is not the same as the ordinary pressure, as far as I know. There is a dis-

tinction between the types of pressure. I would not be positive on that; that is a technical engineering side of it on which I claim no particular knowledge.

Q. 438. Now you have just said that you put the gas in their pipe line at at least one hundred pounds pressure at the intersection of the two lines?

A. That is what our contract provides.

Q. 439. That is, your distribution contract?

A. No, we don't do any distributing of gas.

Q. 440. I say, your distribution contract with the Memphis Power and Light Company under which they distribute?

[fol. 356] A. The Memphis Power and Light Company, yes sir.

Q. 441. At one hundred pounds or more?

A. Yes sir.

Q. 442. This contract for consumption, as I read it, says 14.65 pounds?

A. That has no relation to what we deliver it to them at.

Q. 443. What did you contract, agree to do it for, if it had nothing to do with it?

A. I think, as I said, that has reference to a technical side of it, and not a question of similar type of pressure which we have heretofore been talking about. We recognize 100 pounds to the inch of pressure there, and it had no relation to the barometric pressure.

Mr. Pope: All right.

By Mr. Armstrong:

Q. 444. Mr. Binswanger, has the Commonwealth Gas Company or the Commonwealth Gas Engineering and Management Company either any connection, or has either ever had any connection with the Electric Bond and Share Company, the National Power and Light Company, the Electric Power and Light Company or the Memphis Power and Light Company?

A. I have no knowledge of any connection. Have always understood there was absolutely no connection.

Q. 445. State whether or not in these board meetings, Board of Directors meetings of the Memphis Natural Gas [fol. 357] Company you have been present at every meeting I have attended? Have you ever attended one when I was not present?

A. I don't recall any you were not present.

Q. 446. Have I ever at any of these meetings——?

A. (Interrupting:) Let me correct that: I mean that I was present at every meeting you were there.

Q. 447. Now have I ever at any one of these meetings represented any interest in either Electric Bond and Share Company, National Power and Light Company, or Memphis Power and Light Company?

A. Never, to my knowledge.

Q. 448. Have I, or not, made it perfectly clear to all the members of the board and officers that I did not represent that interest in serving on the board?

A. On frequent occasions.

Q. 449. Who represented the Memphis Power and Light Company as attorney when you were negotiating these contracts?

A. I think it was—you mean, Memphis attorney?

Q. 450. Yes, Memphis attorneys for Memphis Power and Light Company?

A. I think it was Wright, Waring and what is it?

Q. 451. Walker?

A. Walker.

Q. 452. Anyway, it was not my firm—we had no connection with it at that time?

A. No connection whatever with it.

[fol. 358] Q. 453. Has the Memphis Natural Gas Company now, or has it ever had any control over the operations of the Memphis Power and Light Company?

A. None whatever.

Q. 454. Any representation on its board of any kind?

A. None whatever.

Q. 455. Now Mr. Binswanger, when you are making deliveries at Brooks avenue, state whether or not you have two separate lines that deliver, one for the powerhouse, and one for the gas that is distributed by the Memphis Power and Light Company, or is it all one delivery to the Memphis Power and Light Company?

A. As far as I know, all one delivery.

Mr. Armstrong: That is all.

By Mr. Pope:

Q. 456. You have just stated, in answer to Mr. Armstrong's question, that the Memphis Power and Light Com-

pany did not undertake to run the Memphis Natural Gas Company's business, or vice versa. But you have had, and still have all that while during the period covered by this suit, the recognized obligation under your contract to either participate in the profits made or to help make up the deficit of the other at the end of each year in all these so-called contractural settlements?

A. Not exactly that. We have an agreement whereby if our loss, or our earnings should not be adequate, they are [fols. 359-360] supposed to make up a certain part of the deficit, with the end in view of making our operations at least not a financial failure.

Q. 457. In other words the returns to your stockholders, to a certain extent, depending upon the success of the undertakings of the Memphis Power and Light Company in selling and distributing this gas that they bought from your company?

A. So far as the relation to volume of business.

Q. 458. And so far as actual dollars and cents and their profits, too, isn't it?

A. Yes, it had a bearing on that.

Mr. Pope: That is all.

Further deponent sayeth not.

(Signature waived.)

Sworn to before me this 12th day of December, 1938. Henry Rawlinson, Notary Public, Shelby County, Tennessee. My commission expires July 19, 1941. (Seal.)

[fol. 361] In Chancery Court of Davidson County

[Title omitted]

Deposition of French Brantley—Filed June 6, 1939

[fol. 362] The first witness, being Mr. French Brantley, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Pope:

1 Q. Please state your full name and your age and your present occupation.

A. John French Brantley, age 46, position Corporation Clerk, Secretary of State's office.

2 Q. By the Secretary of State's office I take it you mean the Secretary of State of Tennessee?

A. Yes.

3 Q. How long have you been employed in that position, Mr. Brantley?

A. Since January 25, 1937.

4 Q. Do you, in your official capacity, have custody of the charters of corporations and the records, both of the domestic corporations and foreign corporations?

[fol. 363] A. I do, yes, sir.

5 Q. I will ask you to state whether or not the Memphis Natural Gas Co., complainant in this case, has qualified or domesticated in the State of Tennessee?

A. They have.

6 Q. Have you in your possession a certified copy of the charter and amendments of this corporation, that has been filed in the Secretary of State's office?

A. Yes, sir.

7 Q. What was the date of this Company qualified in Tennessee, according to the laws of the State?

A. Mr. Pope, it looks like I haven't got that on this certificate, or copy, this only carries a certified copy of the charter, you see, that does not carry it on this document here, the date it qualified.

8 Q. I will ask you if you will please obtain this information when you return to the office, and let it be inserted in your deposition?

A. Yes, sir.

[fol. 364] 9 Q. Which Mr. Armstrong states will be agreeable?

A. Yes, sir.

10 Q. Please state whether or not this Memphis Natural Gas Co. paid the initial fee required by the State laws in filing its charter and otherwise qualifying?

A. Yes, sir.

11 Q. How much was it?

A. Three hundred and twenty dollars.

12 Q. Please state whether or not they have continued to pay the annual fees for each and every year since it was first qualified?

A. They have paid the annual fee every year.

13 Q. How much?

A. It is $150.00 annually, along with a sworn report.

14 Q. They have made reports, have they, as required by the laws of Tennessee?

A. Yes, sir.

15 Q. These reports are on file in your office?

A. Part of them are now in the archives, but they are accessible.

[fol. 365] 16 Q. They have been filed there, and are also now in the archives where the Secretary of State's office has placed them?

A. Yes, sir.

17 Q. Has there been any evidence filed in the Secretary of State's office by this Company since its initial date of qualification showing any amendments to its charter?

A. Yes, sir, the charter carries one amendment, I believe, I just copied——

18 *A*. Have you in your possession now a certified copy of this amendment?

A. Yes, sir.

19 Q. I will ask you, also, whether or not you have a certified copy or statement of the fact that the annual fees required by this corporation have been paid?

A. Yes, sir.

20 Q. I believe all these papers that I have asked you about, which are certified by the Secretary of State, namely, a copy of the original charter and of the amendment filed thereto, and the statement of the fees paid, are all fastened together?

[fol. 366] A. Yes, sir, they are all contained in this volume right here.

21 Q. Then I will ask you, if you please, to file all of these papers as Exhibit A to your deposition?

Exh. A.

A. Yes, sir.

22 Q. Would these papers that you now have before you show the date that the amendment to the original charter was filed in the Secretary of State's office of Tennessee?

A. I beg your pardon—on one question here, I can go back and answer it, I will read this to you: "Memphis Natural Gas Co., a Delaware corporation, which was filed in this office on August 1st, 1928, and amendment thereto, which was filed on August 13th, 1928."

23 Q. Then August 1, 1928, is the date when it was first filed, and qualified, in this State?

A. Yes, sir.

24 Q. And the next date, which was what?

[fol. 367] A. August 13, 1928, the charter was amended.

25 Q. Was that filed with the Secretary of State on that date?

A. Yes, sir.

26 Q. Then, it will be unnecessary for you to go to the office and get the information I asked you about?

A. No, sir.

27 Q. Those are the correct dates as shown by the records in your office?

A. Yes, sir.

Cross-examination.

By Mr. Armstrong:

28 Q. Mr. Brantley, you have no personal knowledge of this matter, you are merely producing the records from the office with which you are connected, are you?

A. Yes, sir.

29 Q. And they show the filing of the charter, filing of the certificate of amendment, and the payment of the fees [fol. 368] listed?

A. Yes, sir.

30 Q. That is all they show?

A. Yes, sir.

31 Q. What I am getting at is there was no petition or covering letter, or anything, so far as you know, that was sent when the charter was filed, the mere filing of the charter, and subsequent filing of the amendment and payment of the fees?

A. That is all, so far as I know.

Re-direct examination.

By Mr. Pope:

32 Q. In answer to Mr. Armstrong's question, you said none ever filed there, except these papers which you filed a certified copy of. I believe you did state, if I am not mistaken, in your direct examination, that there were annual reports?

A. Yes, sir.

33 Q. Filed by this Company?

[fol. 369] A. Yes, sir.

34 Q. In the Secretary of State's office?

A. Yes, but I was asked especially with reference to the filing of the charter, any letters that came with it at that time.

35 Q. But there are, in the Secretary of State's office, annual reports made to the Secretary of State?

A. Yes, sir.

36 Q. Now when you state that you have no personal knowledge of this matter, I will ask you whether or not you do have personal knowledge that the records of the Secretary of State's office show just what this certification shows?

A. Yes, I have personal knowledge of that.

37 Q. What you mean, is that you were not there at the time that it was filed, and you don't know what took place?

A. That is what I mean.

38 Q. What I mean, Mr. Brantley, is that you have knowl-

[fol. 370] edge of what the records of your office are, and you have produced these particular records that you have described?

A. Yes, sir.

39 Q. But beyond the records of the office you have no knowledge? You have no personal knowledge?

A. No sir.

40 Q. These reports you speak of for the years '32 to '35, inclusive——

A. We have records of '29 to '38.

41 Q. I am particularly interested in '32 to '35, inclusive. Have you copies of those reports with you?

A. No, sir.

42 Q. Have you examined them?

A. No, sir, I haven't examined them, I went down to the archives and got the cash-book they were carried on, you see, and made this record from that, this certificate.

[fol. 371] Further this deponent saith not.

French Brantley, by Grace Dawson, Reporter.

Sworn to before me when given, this 21st day of December, 1938. Grace Dawson, Notary Public. My commission expires Oct. 17, 1939. (Seal.)

[fol. 372] EXHIBIT "A" TO DEPOSITION FRENCH BRANTLEY

STATE OF TENNESSEE

(Seal)

Department of State

I, A. B. Broadbent, Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true and correct copy of the Charter of Incorporation of the Memphis Natural Gas Company, a Delaware corporation which was filed in this office on August 1st, 1928, and amendment thereto, which was filed on August 13th, 1928.

I further certify that the Memphis Natural Gas Company has paid to this office annual filing fees as follows:

July 1, 1929	$150.00
July 8, 1930	150.00
July 13, 1931	150.00
July 6, 1932	150.00
July 7, 1933	150.00
June 30, 1934	150.00
July 10, 1935	150.00
July 2, 1936	150.00
[fols. 373-374] July 2, 1937	150.00
June 29, 1938	150.00

In Witness Whereof, I have hereto affixed my signature and the Great Seal of the State, at Nashville, this 17th day of December in the year of our Lord nineteen hundred 38.

A. B. Broadbent, Secretary of State. (Seal.)

[fol. 375] Certificate of Incorporation of Memphis Natural Gas Company.

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of 1915, and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Memphis Natural Gas Company.

Second. The principal office of the corporation is to be located in the City of Dover, in the County of Kent, in the State of Delaware. The name of its resident agent is the United States Corporation Company, whose address is Nos. 19-21 Dover Green, in said City.

Third. The nature of the business of the corporation and the objects and purposes to be transacted, promoted or carried on by it, are as follows, to-wit:

[fol. 376] (a) To mine for, prospect for, drill for, produce, buy or in any manner acquire, and to market, sell, transport and distribute natural gas and/or artificial gas and any by-products and residual products thereof; to mine for, produce, buy or in any manner acquire, refine, manufacture into its several products and to sell, market, distribute and transport petroleum and its products and by-products and to construct, lay, purchase or in any manner acquire, and to own, hold, maintain and operate and to sell, exchange, lease, encumber or in any manner dispose of lands, works, leases, buildings, pipe lines, mains, distribution systems, machinery, appliances, apparatus, facilities, rights, privileges, franchises, ordinances and all such real and personal property as may be necessary, useful or convenient in the production, acquisition, storage, transportation and distribution of natural gas, artificial gas and petroleum, or any of them, and the products or by-products thereof;

(b) To construct and maintain conduits and lines of tubing and piping for the transportation of natural gas or oil [fol. 377] for the public generally as well as for the use of said corporation; to transport such oil and gas by means of such pipes, tank cars or otherwise and to sell and supply the same to others; to lay, buy, lease, sell and operate pipes, pipe lines and storage tanks to be used for the purpose of transporting and storing oil and gas and of doing a general pipe line and storage business;

(c) To construct and maintain gas wells, oil wells and refineries, and to buy, sell and deal in gas, oil and salt;

(d) To carry on and conduct a general engineering and contracting business, including therein the designing, planning, constructing, enlarging, repairing, removing or otherwise engaging in any works upon buildings, works, roads,

highways, plants, bridges, piers, docks, mines, shafts, reservoirs, waterworks, tanks, railway structures, and all iron, steel, wood, masonry and earth construction, and to undertake, perform, extend and receive any contracts or assignments of contracts therefor; to carry on the general business of appraisers, valuators, and estimators for property, both real and personal;

(e) To purchase, acquire, hold, sell, exchange, pledge, hypothecate, or otherwise dispose of or deal in, the stocks, [fol. 378] notes, bonds, securities, debentures, or other evidences of indebtedness and obligations of any person, persons, firm, copartnership or association, or of any private, public, quasi-public or municipal corporation, domestic or foreign, or of any domestic or foreign state, government or governmental authority, or of any political or administrative sub-division or department thereof, and more particularly corporations transacting a like or similar business, and all trust, participation or other certificates of, or receipts evidencing interest in any such securities, and, while the owner of any such stocks, bonds, or other evidences of indebtedness or interest therein, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes;

(f) To purchase, or otherwise acquire, and to hold, cancel, retire, reissue, or otherwise dispose of the shares of the capital stock, bonds, notes, debentures, debenture bonds and other obligations of this corporation, from time to time, to such extent, at such price, and in such manner and upon such terms, as the Board of Directors of this corporation shall from time to time determine.

[fol. 379] (g) To apply for, purchase, or in any manner to acquire, and to hold, own, use and operate, and to sell or in any manner dispose of, and to grant, license other rights in respect of, and in any manner deal with, any and all rights, inventions, improvements and processes used in connection with or secured under letters patent or copyrights of the United States or other countries, or otherwise, or otherwise to work, operate or develop the same, and to carry on any business, manufacturing or otherwise, which may directly or indirectly effectuate these objects or any of them;

(h) To purchase, lease or otherwise acquire and to hold, own, sell or dispose of real and personal property of all

kinds and in particular lands, buildings, business concerns and undertakings, shares of stock, mortgages, bonds, debentures and other securities, merchandise, book debts and claims, trade-marks, trade names, patents and patent rights, copyrights and any interest in real or personal property.

(i) To borrow money for its corporate purposes, and to make, accept, endorse, execute and issue promissory notes, bills of exchange, bonds, debentures or other obligations [fol. 380] from time to time, for the purchase of property or for any purpose in or about the business of the Company, and, if deemed proper, to secure the payment of any such obligations by mortgage, pledge, deed of trust or otherwise;

(j) To sell, improve, manage, develop, lease, mortgage, dispose of or otherwise turn to account or deal with all or any part of the property of the company;

(k) To do all and everything necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in association with other corporations, firms or individuals, and to do every other act or acts, thing or things incident or appurtenant to or growing out of or connected with the aforesaid business or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized.

(l) The business or purpose of the company is from time to time to do any one or more of the acts and things hereinabove set forth, and it shall have power to conduct and [fol. 381] carry on its said business, or any part thereof, and to have one or more offices, and to exercise all or any of its corporate powers and rights, in the State of Delaware and in the various other states, territories, colonies and dependencies of the United States, in the District of Columbia, and in all or any foreign countries.

Fourth. The total number of shares which may be issued by the corporation is Two Thousand (2,000) all of which shall be without nominal or par value.

Ownership of shares of the capital stock of the corporation shall not entitle the holders thereof to any preemptive right to subscribe for or purchase, or to have offered to

them for subscription or purchase any additional share or shares of stock, either of that authorized in the Certificate of Incorporation of the corporation or thereafter or any shares whatsoever, however acquired, issued or sold by the corporation, it being the purpose and intent that the Board of Directors shall have full right, power and authority to offer for subscription or sale, or to make any disposal of any or all unissued shares of the capital stock of the corporation, upon such consideration in money or property as the Board of Directors shall determine and/or to make any dis-
[fol. 382] posal of any or all shares issued and thereafter acquired by the corporation upon such consideration in money or property as the Board of Directors shall determine.

Without action by the stockholders, the shares of stock without par value may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof, and any and all such shares so issued, the full consideration for which has been paid or delivered, shall be deemed full paid stock and not liable to any further call or assessment thereon and the holder of such shares shall not be liable for any further payment thereon.

Fifth. The corporation will commence business with Ten (10) shares.

Sixth. The names and places of residence of each of the original subscribers to the capital stock and the number of shares subscribed for by each are as follows:

Name	Residence	No. of Shares
E. E. Craig	Dover, Delaware	6
A. L. Raughley	Dover, Delaware	2
M. S. Cook	Dover, Delaware	2

[fol. 383] Seventh. The corporation is to have perpetual existence.

Eighth. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Ninth. The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the By-Laws. In case of any increase in the

number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the By-Laws.

The directors from time to time may determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the company (other than the stock ledger), or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the company, unless expressly so authorized by statute or by a resolution of the stockholders or the directors.

The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any meeting of the stockholders [fol. 384] called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting, (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of directors' interest, or for any other reason.

The directors shall also have power, without the assent or vote of the stockholders, to make and alter By-Laws of the corporation; to fix the time for the declaration and payment of dividends; to fix and vary the amount to be reserved as working capital; to authorize and cause to be executed mortgages and liens upon all the property of the corporation, or any part thereof; to determine the use and disposition of any surplus or net profits over and above the capital stock paid in, and in their discretion the directors may use and apply any such surplus or accumulated profits in purchasing or acquiring the bonds or other obligations or shares of capital stock of the corporation, to such ex- [fol. 385] tent and in such manner and upon such terms as the directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of

decreasing the corporation's capital stock as provided by law.

The directors shall also have power, with the consent in writing of the holders of a majority of the voting stock issued and outstanding, or upon the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power, to sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions as the Board of Directors deem expedient and for the best interests of the corporation.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the statutes of Delaware, of this certificate, and to any By-Laws from time to time made by the stockholders; provided, however, that no By-Laws so made shall invalidate any prior act of the directors which would have been valid if such By-Law had not been made.

[fol. 386] In Witness Whereof, we have hereunto set our hands and seals, the 11th day of June, 1928.

E. E. Craig (L. S.) A. L. Raughley (L. S.) M. S. Cook (L. S.).

In presence of: C. H. Jarvis, As to all.

STATE OF DELAWARE,
County of Ken } ss:

Be it remembers, that on this 11th day of June, A. D. 1928, personally came before me, C. H. Jarvis, a Notary Public in, and for the County and State aforesaid, E. E. Craig, A. L. Raughley and M. S. Cook, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

C. H. Jarvis, Notary Public. (Seal.)

[fol. 387] I, E. F. Berberich, do hereby certify that I am the duly elected, qualified and acting Secretary of Memphis

Natural Gas Company; that the above document is a true copy of the Certificate of Incorporation of said Company as filed in the office of the Secretary of State for the State of Delaware on the 11th day of June, 1928, and duly recorded in the office of the Recorder of Kent County on June 11, 1928, in Record W, Volume 9, and for the purpose of qualifying said Company in the State of Tennessee I hereby authenticate said Charter.

Witness my hand and the seal of said Company this 27th day of July, 1928.

E. F. Berberich, Secretary. (Seal.)

[fol. 388] Certificate of Amendment of Certificate of Incorporation of Memphis Natural Gas Company

[fol. 389] Certificate of Amendment of Certificate of Incorporation of Memphis Natural Gas Company

Adopted in Accordance with the Provisions of Section 26 of Chapter 65 of the Revised Code, as Amended, of the State of Delaware

We, H. G. Scott, President and E. F. Berberich, Secretary of Memphis Natural Gas Company, a corporation existing under the laws of the State of Delaware, do hereby certify under the seal of said Company as follows:

1.—That it appears by the Certificate of A. H. Wall and S. L. Birmingham the Judges who were duly appointed by the stockholders of the Company at a meeting duly called in accordance with the by-laws and the laws of the State of Delaware, and held on the 7th day of August, 1928, at 11:45 o'clock in the forenoon, to conduct the vote of the stockholders of the Company for and against proposed amendments to its Certificate of Incorporation, that the persons or [fol. 390] bodies corporate holding 10 shares of the capital stock of the Company constituting not less than a majority of the issued and outstanding capital stock of the Company, voted in favor of such amendments, and that no shares of the capital stock voted against said proposed amendments.

2.—That the following correctly sets forth the amendments effected.

Articles Third and Fourth of said Certificate have been amended by striking out all of the present text thereof and inserting in lieu thereof the following:

Third: The nature of the business of the Company and the objects or purposes proposed to be transacted, promoted or carried on by it are as follows:

(a) To manufacture, produce, acquire, store, use, supply, transport, distribute, buy and/or sell gas (either natural, mixed and/or artificial) and oil and other mineral products and by-products for heat, light, power, and other purposes, and to manufacture, produce, acquire, use, supply, buy, sell, [fol. 391] and lease gas and vapor manufacturing machines and inventions; to own, hold, explore, develop, purchase, lease or otherwise acquire lands, or the oil, gas and mineral rights in lands, for the purpose of producing therefrom oil, gas or other volatile mineral substances and generally to buy, sell and deal in oil and gas leases; to manufacture, produce, acquire, use, supply, buy, sell and lease gas and vapor consuming machines for utilizing gas or vapor as a fuel or as light, heat or power, and lighting devices and heat and light regulating and saving inventions; to buy, sell and refine oil or other materials for the manufacturing of gas or vapor or for the production of heat, light and power; and to carry on all the business that are usual to or may be conveniently carried on by gas companies or gas pipe line companies;

(b) To acquire, construct, erect, lay down, maintain, enlarge, alter, work and use all such lands, buildings, ease-[fol. 392] ments, gas, and other works, machinery, plants, pipes, pipe lines, mains, holders, ovens, retorts, purifiers, compressors, meters, apparatus, appliances, materials and things, and to supply all such materials, products and things as may be necessary, incident or convenient in connection with the production, use, storage, regulation, measurement, transportation, supply and distribution of any of the products of the Company;

(c) To carry on and conduct a general engineering and contracting business, including therein the designing, planning, construction, enlarging, repairing, removing or otherwise engaging in any work upon buildings, works, highways, plants, pipe lines, compressors and holders, and to under-

take, perform, extend and receive any contracts or assignments of contracts therefor;

(d) To subscribe for, purchase, acquire, hold, sell, ex-
[fol. 393] change, pledge, hypothecate, or otherwise dispose of or deal in, the capital stock, scrip, notes, bonds, securities, debentures or other evidences of interest or of indebtedness, including all trust, participation or other certificates of, or receipts or other instruments evidencing interest therein, of any person, persons, firm, co-partnership, trust or association, or of any private, public, quasi-public or municipal corporation, domestic or foreign, or of any domestic or foreign state, government or governmental authority, or of any political or administrative subdivision or department thereof, and to pay for the same in cash or other property, and to issue in exchange therefor shares of the capital stock, bonds, notes or other obligations of the Company, and, while the holder or owner of any such capital stock, scrip, notes, bonds, securities, debentures, or other evidences of interest or of indebtedness, to exercise all the rights, powers and privileges of ownership, including any applicable voting privileges;

[fol. 394] (e) To guarantee the payment of dividends on any shares of the capital stock of any corporation, joint stock company or association in which the Company has or may at any time have an interest; to endorse or otherwise guarantee the payment of the principal of, or interest on, any scrip, bonds, notes, debentures, coupons, mortgages, or other securities issued or created by any corporation, joint stock company or association in which the Company has an interest, or the shares or securities of which it owns; to become surety for and to guarantee the carrying out or the performance of any and all mortgages, leases, covenants, warranties, contracts and agreements of every kind or character of any corporation, joint stock company or association in which the Company has an interest, or the shares or securities of which it owns; to do any and all lawful things designed to protect, preserve, improve or enhance the value of any such shares, scrip, voting trust certificates, bonds, notes, debentures, coupons, mortgages, securities, or other evidences of indebtedness of or of in-
[fol. 395] terest in any corporation, joint stock company or association in which the Company has an interest or the shares or securities of which it may own; and to guarantee

or be surety upon the contracts, notes, bonds and obligations of individuals, firms or partnerships when the making of such guarantee or becoming such surety is incidental to or in aid of the conduct by the Company of any business authorized by this Article;

(f) To buy, purchase, or otherwise acquire, and to hold, cancel, retire, reissue, or otherwise dispose of the shares of the capital stock, bonds, notes, debentures, and other obligations of the Company, from time to time, to such extent, at such price, and in such manner and upon such terms, as the Board of Directors of the Company shall from time to time determine, subject however to the provisions of Sub-divisions F, G and H of Article Fourth hereof;

(g) To enter into and make, and perform and carry out [fol. 396] contracts of any kind and description made for any lawful purpose, without limit as to amount, with any person, firm, association or corporation, either public or private, or with any government or political subdivision thereof;

(h) To manufacture, construct, and/or to buy, lease or otherwise acquire and/or to own, consume, use, mortgage, pledge, demise, sell, assign, grant, license, transfer or otherwise dispose of or trade and deal in and with real, personal and/or mixed property of every kind and description whatsoever, the foregoing words being used in their most inclusive sense and (without prejudice to the generality of the foregoing) including: real estate and all interests therein, improvements upon real estate, fixtures, physical property of every character and description, choses in action, patent rights, franchises, copyrights, trademarks, contract rights and securities;

(i) To borrow money; to draw, make, accept, endorse, [fol. 397] transfer, assign, execute and issue bonds, debentures, promissory notes, bills, drafts and other evidences of indebtedness, and for the purpose of securing any of its obligations or contracts to convey, transfer, assign, deliver, mortgage and/or pledge all or any part of the property or assets at any time owned or held by the Company upon such terms and conditions as the Board of Directors shall authorize, and as may be permitted by law;

(j) To the extent permitted by law, to loan money and to take notes, open accounts and other similar evidences of

debt as security therefor, provided that the Company shall not make any loan of money to any officer of the Company, nor shall any loan be made to a stockholder upon the security of the stock of the Company;

(k) To merge or consolidate with any corporation in such manner as may be permitted by law; to acquire, and take over as a going concern and thereafter to carry on the business of any person, firm, or corporation engaged [fol. 398] in any business which the Company is authorized to carry on, and in connection therewith to acquire all or any part of the assets and to assume or otherwise provide for all or any of the liabilities of any such business;

(l) To carry out all or any part of the foregoing objects as principal, factor, agent, contractor, or otherwise, either alone or in connection with any person, firm, association or corporation.

(m) To do any one or more of the acts and things hereinabove set forth, to conduct and carry on its said business, or any part thereof, and to have one or more offices and to exercise all or any of its corporate powers and rights, in the State of Delaware, and in the various other states, territories, colonies and dependencies of the United States, in the District of Columbia, and in all or any foreign countries;

(n) To do any and all things herein set forth, and in [fol. 399] addition such other acts and things as are necessary or convenient to the attainment of the purposes of the Company, or any of them, to the same extent as natural persons lawfully might or could do in any part of the world, in so far as such acts are permitted to be done by a corporation organized under the General Corporation Law of the State of Delaware.

The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the Company, and are in furtherance of, and in addition to, and not in limitation of the general powers now or hereafter conferred by the laws of the State of Delaware.

It is the intention hereof that the purposes, objects and powers specified in this Article Third and all subdivisions thereof shall, except as otherwise expressly provided, in

nowise be limited or restricted by reference to or inference from the terms of any other clause or paragraph of this [fol. 400] Article, and that each of the purposes, objects and powers specified in this Article Third shall be regarded as independent purposes, objects and powers.

Notwithstanding anything in this Article Third to the contrary, nothing in this Article shall be deemed to authorize the Company to do any act in violation of any applicable laws of the state or governmental subdivision wherein such act is done.

Fourth. The total number of authorized shares of the capital stock of the Company is Six Hundred Twenty Thousand (620,000) shares, all without nominal or par value, divided into Twenty Thousand (20,000) shares of $7 Cumulative Preferred Stock and Six Hundred Thousand (600,000) shares of Common Stock.

The relative rights of the holders of the $7 Cumulative Preferred Stock and of the Common Stock are as follows:

Subdivision A:

The holders of the $7 Cumulative Preferred Stock shall be entitled to receive, when and as declared by the Board of Directors out of the annual net profits of the Company or out of its net assets in excess of its capital, cumulative [fol. 401] dividends at the rate of Seven Dollars ($7.00) per share per annum, and no more, payable quarterly on the first day of January, April, July and October in each year. The said cumulative preferred dividends shall accrue from the quarterly dividend payment date next preceding the date of the original issue of each share of such stock, unless such stock shall be issued on a quarterly dividend date and in such case from said date.

No dividend payable in cash or property shall be declared or paid at any time upon the common stock of the Company unless full cumulative dividends upon all outstanding shares of $7 Cumulative Preferred Stock for all previous dividend periods shall have been declared and paid and the Board of Directors shall have appropriated and set apart a sum sufficient for the payment of the dividend on such shares for the current dividend period, nor unless compliance shall be had with the provisions of Subdivision D hereof. In such event, and only in such event, the holders of the Common Stock outstanding shall be

entitled to receive dividends upon such shares of Common Stock, out of the entire remaining net profits of the Company, or out of the net assets in excess of the capital stock of the Company.

[fol. 402] Subdivision B:

Upon the voluntary or involuntary dissolution, liquidation or winding up of the Company, or the sale of all its assets, or distribution of assets by way or return of capital, the holder of each share of $7 Cumulative Preferred Stock shall be entitled to receive and shall be paid an amount equal to but not to exceed One Hundred and Ten Dollars ($110) per share, plus an amount equal to but not to exceed Seven Dollars ($7.00) per annum from the date on which dividends became cumulative in respect of such share, to the date of such payment, less an amount equal to all dividends previously paid on such share, out of the assets of the Company, and after the payment of such sum to the holders of each share of such $7 Cumulative Preferred Stock, any and all assets of the Company then remaining shall be available for distribution pro rata exclusively among the holders of shares of Common Stock according to the number of such shares held by each of them respectively. If upon such liquidation, dissolution or winding up of the Company, or sale of all its assets or distribution of its assets by way of return of capital, the amount distributable among the holders of the $7 Cumulative Preferred Stock shall be insufficient to permit payment in full to such holders of the preferential amounts aforesaid, then the assets of the Company to be distributed among such holders shall be distributed ratably [fol. 403] in proportion to the full preferential amounts to which they are respectively entitled. A consolidation or merger of this Company with any other corporation or corporations shall not be deemed or taken as a liquidation, dissolution or winding up of the Company, sale of all of its assets or distribution of assets by way of return of capital within the meaning of this subdivision.

Subdivision C:

All or any part of the $7 Cumulative Preferred Stock shall be subject to redemption by and at the option of the Board of Directors of the Company at any time at a redemption price equal to but not to exceed One Hundred and Ten Dollars ($110) per share, plus an amount equal

to but not to exceed Seven Dollars ($7.00) per annum from the date whereon dividends became cumulative in respect of such share, to the date of such payment, less an amount equal to all dividends previously paid on such share, out of the assets of the Company, upon thirty (30) days' notice mailed to the holders of the shares proposed to be so redeemed at their respective addresses as the same shall appear on the stock books of the Company. If it is intended at any time to redeem less than all of such shares of $7 [fol. 404] Cumulative Preferred Stock then outstanding, shares shall be selected for redemption in such manner and by such method as shall from time to time be determined by the Board of Directors. If such notice of redemption shall have been duly given or shall have been waived, and if on or before the date of redemption named in such notice the funds necessary for the payment of the redemption price of the shares so to be redeemed shall have been set aside and shall be and continue available therefor, then on and after such date of redemption, notwithstanding that a certificate or certificates representing some of the shares so to be redeemed shall not have been surrendered for cancellation, all dividends on the shares so to be redeemed shall cease to accrue and such shares shall no longer be transferable on the books of the Company except to the Company and the holder or holders of any such shares shall have no right in or in respect of the Company by reason of the ownership of such shares other than the right to receive the redemption price upon the surrender of the certificate or certificates representing such shares, and provided further that if such notice of redemption shall have been duly given or shall have been waived, and the funds necessary for the payment of the redemption price of the shares to be redeemed shall have been set aside and [fol. 405] shall be and continue available for such redemption, then on and after such notice has been given or waived and such funds have been thus set aside, the shares of stock to be redeemed shall not thereafter be deemed outstanding for the purposes of any of the determinations hereinafter provided in Subdivisions D, E, F, G and/or I of this Article Fourth.

Subdivision D:

So long as Five Thousand (5,000) or more shares of $7 Cumulative Preferred Stock shall be outstanding the

Company shall not pay or declare any dividends in cash or property on any of its outstanding shares (exclusive of the cumulative dividends on outstanding shares of $7 Cumulative Preferred Stock) unless the Company shall have, out of its net profits or out of its net assets in excess of its capital, purchased and cancelled or redeemed an aggregate number of shares of its $7 Cumulative Preferred Stock equal to the sum of the number of shares hereinafter designated for such purchase or redemption in respect of the calendar year in which such dividend payment is made and also in respect of each previous calendar year subsequent to the calendar year 1928. The number of shares of $7 Cumulative Preferred Stock designated for purchase or [fol. 406] redemption in respect of each calendar year for the purposes of the foregoing calculation shall be one-half of that number of shares arrived at by dividing the total number of shares of $7 Cumulative Preferred Stock outstanding on the first day of January of such calendar year by the number of full calendar years which will elapse between the first day of January (such day being included) of the calendar year in respect of which such determination is made and January 1, 1944. Shares of said $7 Cumulative Preferred Stock purchased or redeemed by the Company pursuant to the provisions of this Subdivision D shall not be resold or reissued by the Company without the consent of the holders of two-thirds of the shares of $7 Cumulative Prefered Stock then outstanding.

Subdivision E:

The holders of the $7 Cumulative Preferred Stock shall have no right to vote on such stock either at elections of directors or in any other corporate proceedings or meetings, or to receive notice thereof, and they relinquish and waive absolutely the right to vote thereon save only in so far as the statutes of the State of Delaware prohibit or prevent the relinquishment or waiver by such holders of the [fol. 407] right to vote thereon, and save only as the vote or consent of a proportion of the holders of the shares of outstanding $7 Cumulative Preferred Stock is hereinafter required in Subdivision F hereof, or for certain amendments to this Certificate, and for the issuance of certain additional stock of the Company, unless dividends for eight (8) quarterly dividend periods (whether consecutive or not) payable on the $7 Cumulative Preferred Stock shall be unpaid.

Any voting right, however, resulting from dividend default as aforesaid shall cease when all unpaid cumulative dividends on the $7 Cumulative Preferred Stock shall have been paid, or a sum sufficient for the payment thereof shall have been set apart for such payment.

Holders of Common Stock shall be entitled to one vote for each share of such stock standing in their names on the books of the Company. Whenever by reason of nonpayment of cumulative preferred dividends any holder of $7 Cumulative Preferred Stock shall be entitled to vote, or participate in the consenting to any proposed corporate action, said holder shall be entitled to a number of votes for each share of such stock ascertained by dividing the number of shares of stock exclusive of the $7 Cumulative Preferred Stock outstanding on the day on which such vote is cast or consent given, or on such earlier day as the Board of Directors shall designate (but not more than [fol. 408] thirty (30) days earlier than the day on which such vote is cast or consent given) by the number of shares of $7 Cumulative Preferred Stock outstanding on such day.

Subdivision F:

So long as any shares of the $7 Cumulative Preferred Stock of the Company are outstanding, the Company shall not (except as hereinafter permitted) issue, or permit to be issued, or guarantee any bonds, notes, debentures, or other similar securities evidencing promises to pay money, unless such issuance or guarantee shall have been authorized by the affirmative vote or consent of the holders of two-thirds of the shares of $7 Cumulative Preferred Stock outstanding at the time of the giving of such authorization or consent, provided that the Board of Directors may without such vote or consent authorize the Company to issue and/or to guarantee bonds, notes, debentures and/or similar securities in an aggregate principal amount of not exceeding Six Million Three Hundred Thousand Dollars ($6,300,000.00) at any one time outstanding, bearing interest at such rate or rates as the Board of Directors shall determine, and bonds, notes, debentures and/or other similar securities [fol. 409] maturing twelve (12) calendar months from the date of the issuance thereof.

Subdivision G:

The shares of $7 Cumulative Preferred Stock may be issued by the Company from time to time to the extent of

Thirteen Thousand (13,000) such shares for such consideration as may be fixed from time to time by the Board of Directors, and to such persons, firms and/or other corporations as the Board of Directors in its discretion may designate, and additional shares of the $7 Cumulative Preferred Stock authorized by this Certificate may be issued by the Company from time to time by the Board of Directors, and to such persons, firms and/or other corporations as the Board of Directors in its discretion may designate, provided, however, that no such additional shares may be issued without the consent of the holders of two-thirds of the shares of $7 Cumulative Preferred Stock then outstanding, unless the Company receives at least Eighty-five Dollars ($85) per share in cash or in property valued at such amount by an independent engineer.

Subdivision H:

No holder of Common Stock shall be entitled as a matter [fol. 410] of right to subscribe for or receive additional shares of any class of redeemable preferred stock of the Company whether now or hereafter authorized, or additional shares of Common Stock included within the Six Hundred Thousand (600,000) such shares authorized by this Certificate, or any bonds, debentures or other securities convertible into such shares, but such shares or such other securities convertible into such shares, may be issued or disposed of by the Board of Directors to such persons and on such terms as in its discretion it shall deem advisable. Before the Company, however, shall issue or sell or in any manner dispose of (whether for cash or property) any shares of its Common Stock in excess of the Six Hundred Thousand (600,000) shares of such Common Stock authorized by this Certificate, it shall first mail to each holder of outstanding common stock on its books a statement of the terms and conditions upon which such stock is proposed to be issued, sold or disposed of, and shall give to each holder of Common Stock an opportunity to acquire an amount of such additional Common Stock proportionate to the number of then outstanding shares of Common Stock then held by such holder at such price or for such consideration as the Board of Directors may determine and as shall be set forth in such statement, which price or consideration shall not be greater per share than the price or con-

[fol. 411] sideration for which such stock is proposed to be issued or disposed of. The Board of Directors may issue or dispose of any such shares not acquired by the holders of Common Stock within thirty days after the mailing of such statement, to any other persons, firms or corporations on the terms and conditions initially proposed in such statement. The Board of Directors may in its discretion make such stock, cash or property adjustments as may be necessary or desirable to avoid the issuance of fractional shares or certificates therefor.

No holder of stock of any class other than the Common Stock shall be entitled as a matter of right to subscribe for or receive additional shares of any class of stock of the Company, whether now or hereafter authorized, or any bonds, debentures or other securities convertible into stock, but such additional shares of stock or other securities convertible into stock may, so far as such stockholders are concerned, be issued or disposed of by the Board of Directors to such persons and on such terms as in its discretion it shall deem advisable.

Subdivision I:

The Company reserves the right to amend, alter, change, add to, or repeal any provision contained in this Certificate of Incorporation in the manner now or hereafter prescribed [fol. 412] by statute and all rights conferred on officers, directors and stockholders herein are granted subject to this reservation, provided, however, that no change shall be made adversely affecting the preferential position and/or any voting rights of the holders of the $7 Cumulative Preferred Stock of the Company, or providing for the issuance of shares of said $7 Cumulative Preferred Stock in addition to the Twenty Thousand (20,000) shares authorized by this Certificate, or providing for the issuance of any class of stock having rights prior to or on a parity with said $7 Cumulative Preferred Stock unless such amendment and the issuance of such stock is consented to by the holders of two-thirds of the outstanding shares of $7 Cumulative Preferred Stock, and provided further that no such amendment, alteration, change, addition or repeal in any wise limiting, restricting or adversely affecting the preemptive right of common stockholders to acquire additional shares of stock of the Company as set forth in the next preceding Subdivi-

sion H or modifying any of the provisions of this second proviso of this Subdivision I shall be made unless the holders of seventy-six per cent (76%) of the outstanding Common Stock of the Company shall consent to or vote in favor of such amendment, alteration, change, addition or repeal.

[fol. 413] Subdivision J:

Shares held in the treasury of the Company or shares deposited in escrow, or reserved or set aside for delivery in the event of the exercise of stock purchase privileges or warrants under arrangements whereby such shares will belong to or be returned to the Company in the event that such purchase privileges or warrants are not exercised, shall not be deemed outstanding for the purposes of any determination contemplated in this Article Fourth.

All persons who shall acquire stock in the Company shall acquire it subject to the provisions of this Certificate of Incorporation.

So far as not otherwise expressly provided by the laws of the State of Delaware, the Company shall be entitled to treat the person in whose name any share is registered as the owner thereof for all purposes and shall not be bound to recognize any equitable or other claim to of interest in such share on the part of any other person whether or not the Company shall have notice thereof.

Article Ninth has been stricken out and in lieu thereof [fol. 414] and in addition thereto there have been inserted the following Articles Ninth to Thirteenth inclusive, reading as follows:

Ninth: The number of directors of the Company shall be fixed and may be altered from time to time as may be provided in the by-laws, except that the board shall not consist of less than three (3) directors. In case of any increase in the number of directors, the additional directors may be elected by the board of directors to hold office until the next annual meeting of the stockholders and until their successors are elected and qualified. In case of vacancies in the board of directors, the board of directors may elect directors to fill such vacancies. Except where specifically requested by the holders of at least twenty-five per cent (25%) of the outstanding stock entitled to vote at any stockholders' meeting for the election of directors, or by

at least two directors in the case of an election of directors by the board of directors, elections of directors need not be by ballot, but may be upon the oral expression of the persons participating in such meeting.

Tenth: In furtherance and not in limitation of the powers conferred by statute the Board of Directors is expressly authorized:

[fol. 415] (a) To fix, determine and vary from time to time the amount to be maintained as surplus and the amount or amounts to be set apart as working capital.

(b) To set apart out of any of the funds of the Company available for dividends a reserve or reserves for any proper purpose and/or to abolish any such reserve in the manner in which it was created.

(c) Without any action on the part of the stockholders to make, amend, alter, change, add to or repeal by-laws for the Company. The by-laws made by the directors may be amended, altered, changed, added to or repealed by the stockholders.

(d) Without any action on the part of the stockholders (except as contemplated in Subdivision F of Article Fourth) to authorize and cause to be executed mortgages and liens, without limit as to amount, upon the real and personal property of the Company.

[fol. 416] (e) From time to time to determine whether and to what extent, at what time and place, and under what conditions and regulations the accounts and books of the Company or any of them, shall be open to the inspection of any stockholder; and no stockholder shall have any right to inspect any account or book or document of the Company except as conferred by statute or by-laws or as authorized by a resolution of the stockholders or board of directors.

(f) To sell, assign, convey or otherwise dispose of a part of the property, assets, and effects of the Company less than the whole or less than substantially the whole thereof, on such terms and conditions as shall be deemed advisable, without the assent of the stockholders in writing or otherwise; and also to sell, assign, transfer, convey and otherwise dispose of the whole or substantially the whole of the property, assets, effects, franchises and goodwill of the

Company on such terms and conditions as they shall deem [fol. 417] advisable, but only with the assent in writing or pursuant to the affirmative vote of the holders of not less than a majority of all of the shares of stock issued and outstanding and having voting power at the time such assent is required.

(g) All of the powers of the Company, in so far as the same lawfully may be vested by this Certificate in the Board of Directors, and except as otherwise provided herein, are hereby conferred upon the Board of Directors of the Company.

Eleventh.—In the absence of fraud, no contract or transaction between the Company and any other association or corporation shall be affected by the fact that any of the directors or officers of the Company are interested in or are directors or officers of such other association or corporation, and any director or officer of the Company individually may be a party to, or may be interested in any such contract or transaction of the Company; and no such contract or transaction of the Company with any person or persons, firm, association or corporation, shall be affected by the fact that any director or officer of the Company is a party to, or interested [fol. 418] in such contract or transaction, or in any way connected with such person or persons, firm, association or corporation; and each and every person who may become a director or officer of the Company is hereby relieved from any liability that might otherwise exist from thus contracting with the Company for the benefit of himself or any person, firm, association or corporation in which he may be in any wise interested.

Twelfth.—Except where other notice is specifically required by statute, written notice of any stockholders' meeting given as provided in the by-laws shall be sufficient without publication or other form of notice. No notice of any meeting need be given to any person not entitled to vote at such meeting. Whenever any notice whatever is required to be given under the provisions of Chapter 65 of the Revised Code of Delaware, or under the provisions of this Certificate of Incorporation or by the by-laws of this corporation, a waiver thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto.

Thirteenth.—If the by-laws so provide, both stockholders and directors of the Company shall have power to hold their meetings either within or without the State of Delaware; and, except as otherwise provided by statute, the [fol. 419] books of the Company may be kept outside of the State of Delaware at such place or places as may be from time to time designated by the Board of Directors.

3. That such amendment has been duly adopted in accordance with the provisions of Section 26 of Chapter 65, of the Revised Code, as amended, of the State of Delaware. The capital of the corporation will not be reduced under or by reason of this amendment.

In Witness Whereof, We, H. G. Scott, President and E. F. Berberich, Secretary of Memphis Natural Gas Company, have signed this Certificate and caused the corporate seal of the Company to be hereunto affixed this 7th day of August, 1928.

H. G. Scott, President. E. F. Berberich, Secretary.
(Seal.)

[fol. 420] State of New York,
County of New York, ss:

Be It Remembered, that on this 7th day of August, 1928, personally came before me, McLane Tilton III, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn to take acknowledgment or proofs of deeds, H. G. Scott, President of Memphis Natural Gas Company, a corporation of the State of Delaware, the corporation described in the foregoing Certificate, known to me personally to be such, and he the said H. G. Scott as such President, duly executed said Certificate before me and acknowledged the said Certificate to be his act and deed and made on behalf of said corporation; that the signatures of the said President and of the Secretary of said corporation to said foregoing Certificate are in the handwriting of the said President and of the Secretary of said corporation, respectively, and that the seal affixed to said Certificate is the common or corporate seal of said corporation, and that his act of sealing, executing, acknowledging and delivering the said Certificate was duly authorized by the stockholders of said corporation.

In Witness Whereof, I have hereunto set my hand and [fol. 421] seal of office the day and year aforesaid.

McLane Tilton, III, Notary Public, N. Y. County No. 198, New York County Reg. No. O-256. Commission expires March 30, 1930. (Seal.)

[fol. 422] I, E. F. Berberich, do hereby certify that I am the duly elected, qualified and acting Secretary of Memphis Natural Gas Company, a corporation organized under the laws of the State of Delaware and that as such Secretary I am the keeper of the seal and of the records of said Company.

I further certify that the attached amendment to the Certificate of Incorporation of Memphis Natural Gas Company is a full, true and correct copy of an amendment to the Certificate of Incorporation of said Company, adopted at a meeting of the stockholders thereof, duly convened and held on the 7th day of August, 1928.

I further certify that said amendment was filed in the office of the Secretary of State of Delaware and recorded in the office of Recorder of Deeds of Kent County, Delaware, on the 8th day of August, 1928.

In Witness Whereof, I have hereunto affixed my signature and affixed the seal of the Company, this 10th day of August, 1928.

(Signed) E. F. Berberich, Secretary. (Seal.)

[fol. 423] In Chancery Court of Davidson County

Deposition of F. O. Beerman—Filed June 6, 1939

F. O. Beerman, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Pope:

1 Q. Please give your name, age and place of residence, Mr. Beerman.

A. Name, F. O. Beerman; Age 72, address, Route 4, Woodbine Branch, Nashville, Tennessee.

2 Q. What is your occupation or profession?

A. Certified accountant.

3 Q. You are a certified public accountant, are you?

A. Yes, sir.

4 Q. How long have you been so?

A. Certified in December, 1913.

[fol. 424] 5 Q. You have been practicing your profession, have you, for a great many years, if so, how long?

A. Well, I have been following it right on up from the time I entered it up till now. I don't go quite as strong now as I did when I was a little younger.

6 Q. I take it you had practiced your profession some before you became a C. P. A.—had you?

A. Yes, sir. I was also with the Fourth National Bank, the old Fourth National Bank, for twenty-three years, before I went into the business.

7 Q. What was your business there?

A. As bookkeeper.

8 Q. Did you do any accounting there?

A. There wasn't any accounting in those days, just a common bank man.

9 Q. Did you occupy any position with the State of Tennessee in years gone by?

A. Yes, sir.

10 Q. What was that?

[fol. 426] A. I was special auditor for the Highway Department under Commissioner J. G. Creveling.

11 Q. How long did you occupy the position with Mr. Creveling in the Highway Department?

A. I think it ran along about three and a half years. Gov. Peay appointed me to that position during his administration, made a contract with me for special auditing.

12 Q. You were employed there as a special accountant or regular position, or what?

A. Special auditor to go into anything whatever that came before us, and if I had to go out in the field, which I did do, all over the state, various matters to look after that came up.

13 Q. I will ask you whether or not you have been asked by solicitors representing the State, in the present litigation with the Memphis Natural Gas Co., to make an investigation and prepare some charts with reference to the respective ownerships of different corporations and different directors?

A. I have.

14 Q. Have you made that investigation?

A. I have, yes, sir.

[fol. 426] 15 Q. Have you before you some charts that you have prepared, and had prepared, that show these different hook-ups of these different corporations?

A. Yes, sir.

16 Q. From what source did you get your information upon which you based the information shown on these charts?

A. Moody's Manual for the years involved.

17 Q. What years do your charts cover?

A. Cover 1928, 1932-3-4-5-6.

18 Q. What is Moody's Manual?

A. It is a recognized publication setting up the operations, management, etc., of utilities, etc., in this case.

19 Q. Is it, or not, recognized in the financial world and groups, and other places as well, as authority, or what do you say about that?

A. I have understood it is a very reliable source of information.

[fol. 427] 20 Q. Now the Moody's Manual that you spoke of, is there, or not, a manual for industrial corporations, and also one for utilities?

A. Yes, sir, all come in the same manual.

21 Q. Are they in the same volumes—it does not make any difference, they cover both, is the point I am trying to get at.

A. They give you all relations in the case of utilities.

22 Q. Now where is the plat that you have there for the year 1928?

A. That is it.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, beginning on page 10 of the deposition, with Question No. 23:

"23 Q. Well, now, as I am going to ask you to take this plat or chart, and explain just what it is, that is, this dia-

[fol. 428] gram that you have on the top of the page, that is for the year of 1928."

and ending on page 28 with the following Question 137, and answer:

137 Q. I will ask you to please file that chart, including all the information thereon, which you have identified as

Exhibit C to your deposition, and make it a part of the same.

A. I do."

and Exhibits "A", "B" and "C".

Said testimony, including all testimony of said witness between said question and answer and all exhibits thereto are objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

[fol. 429] Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

23 Q. Well, now, I am going to ask you to take this plat or chart and explain just what it is, that is this diagram that you have on the top of the page, that is for the year of 1928.

A. You first begin with the Electric Power & Light Corporation showing 18% owned, the Electric Bond & Share Co. controlling and supervising Electric Power & Light Corporation.

24 Q. Pardon me just a moment. You say that the Electric Power & Light Co. is owned, 18% owned, by whom?

[fol. 430] A. It is owned by this Electric Bond & Share.

25 Q. What does the line coming down from the line on which is written the Electric Bond & Share Co. to the Electric Power & Light Co., what does that indicate?

A. That indicates that they control and supervise.

26 Q. And also what about the ownership?

A. The ownership runs to 18%——

27 Q. All right.

A. By the Electric Power & Light. Now in turn the Electric Power & Light Corporation own the Arkansas Power & Light 100%, also the Louisiana Power & Light 100%, the Mississippi Power & Light 100%.

28 Q. What company owns those three companies 100%?

A. This Electric Power & Light Corporation.

29 Q. Go ahead.

A. This Industrial Sales Corporation——

30 Q. It is marked on your map as what?

[fol. 431] Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 11 of his deposition, beginning with:

"and explain just what it is, that is, this diagram that you have on top of the page, that is for the year 1928?"

and ending:

"30 Q. It is marked on your map as what?"

being part of Question 23 and answers through Question 30. Said testimony being all of the testimony of said witness on said page 11, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

[fol. 432]

III

Because the witness does not testify of his own knowledge but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainants.

30 Q. It is marked on your map as what?

A. It is marked on our map as Industrial Gas Corporation—it is.

31 Q. There is no "Sales" in the name of it?

A. No, sir. I was thinking about this over here.

32 Q. Go ahead.

A. Industrial Gas Corporation is affiliated and controlled by the Electric Power & Light Corporation.

[fol. 433] 33 Q. All right.

A. Now we get into the purchase contracts with Memphis Natural Gas Co.

34 Q. From whom does it have this contract to purchase, or did have in '28?

A. That portion there, connection——

35 Q. The sales contract, I am talking about the purchase of the Gas.

A. The sales contract is through the Memphis Natural Gas, from the Arkansas Power & Light Co., Louisiana Power & Light Co., and Mississippi Power & Light Co.

36 Q. Those are sales contracts?

A. Yes, sir—just a moment now, wait a minute——

37 Q. The sales contracts that you have shown on your plat or chart with the Mississippi Power & Light, the Louisiana Power & Light and the Arkansas Power & Light, —is that a purchase from those companies by the Memphis Natural Gas, or is it a sale to those Companies by the Memphis Natural Gas?

[fol. 434] A. This is a sales contract here, all of these.

38 Q. All those three?

A. Yes, sir.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 12 of his deposition, beginning with:

"A. It is marked on our map as Industrial Gas Cor—

and ending:

"A. Yes, sir."

being Answer to Question 30 and answers through Answer to Question 38. Said testimony, being all of the testimony

of said witness on said page 12, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

[fol. 435] Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

39 Q. From whom does the Memphis Natural Gas buy its gas, if your plat shows?

A. The plat don't show that.

40 Q. What is the connection with the Industrial Gas Corporation, with the Memphis Natural Gas—you have something there, I can't read it.

[fol. 436] A. This is the purchase contract between this and that, between the Industrial Gas Corporation and the Memphis Natural Gas Co.

41 Q. Meaning what?

A. Means this is a purchase contract with these two right here, over here, from here to here.

42 Q. That is, the Memphis Natural Gas purchases its gas from the Industrial Gas Corporation?

A. Yes. That answers your question?

43 Q. Yes, sir. Now take what else you have on your plat from here?

A. Now we have National Power & Light Corporation controlled and supervides by Electric Bond & Share, and Electric Bond & Share owns 31%.

44 Q. Of what?

A. Of the National Power & Light Corporation, and in turn the National Power & Light owns the Memphis Power

& Light 99.9%, and the West Tennessee Power & Light by 100%.

[fol. 437] 45 Q. Now just a moment. The West Tennessee Power & Light Co., which you say the National Power & Light Co. owns 100%, that wasn't in 1928?

A. No, sir; no, sir.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 13 of his deposition, beginning with:

"39 Q. From whom does the Memphis Natural Gas buy its gas, if your plat shows?"

and ending:

"A. No, sir; no, sir."

being Question 39 and answers through Answer to Question 45. Said testimony, being all of the testimony of said witness on page 13, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the [fol. 438] best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

46 Q. When did that start, do you recall? I guess your other plat shows that.

A. I have here——

47 Q. Just a moment, it is not necessary to go into that. These figures you are giving here now are for 1928, if I understand you?

[fol. 439] A. Yes, sir.

48 Q. Go ahead.

A. Memphis Natural Gas has a sales contract with the West Tennessee Power & Light.

49 Q. But not in 1928, did it?

A. I don't think so.

50 Q. Did it also have a contract with the Memphis Power & Light—it did, of course that is admitted,—Mr. Armstrong, it is a little leading, I recognize.

A. I wasn't listening to you.

51 Q. I say, your chart shows that the Memphis Power & Light Co. had a contract of purchase of gas from the Memphis Natural Gas Co.?

A. From the Memphis Natural Gas Co.

52 Q. Is that what that line indicates here?

A. Yes sir, it indicates a sales contract with the Memphis Power & Light Co.

53 Q. Memphis Power & Light?

[fol. 440] A. Yes, sir.

54 Q. What per cent does your plat show, and the facts as disclosed by Moody's Manual, percentage of the stock in 1928 that the——

A. Memphis Natural Gas——

Exceptions to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 14 of his deposition, beginning with:

"46 Q. When did that start, do you recall? I guess your other plat shows that."

and ending;

"54 Q. What per cent does your plat show and the facts as disclosed."

being Question 46 and answers through part of Question 54. Said testimony being all of the testimony of said witness on said page 14, is objected to on the following grounds:

[fol. 441] I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

55 Q. Just a minute now. That the Electric Power & Light Co. owned of the stock of the Memphis Natural Gas Co.?

[fol. 442] A. Twenty-five per cent, organized in 1928, Memphis Natural Gas Co. was organized in 1928.

56 Q. With 25% of the stock?

A. Yes, sir,

57 Q. Electric Power & Light Co., in 1928, owned 25% of the outstanding stock, probably, of the Memphis Natural Gas Co.,—is that what your plat shows?

A. Yes, sir.

58 Q. Now I notice on this same chart that you have, covering the period of 1928, some other information below on the same page where the plat is. Please explain just what that is.

A. I have a memorandum showing that the Electric Bond & Share Co. supplies technical and financial assistance and business development and operations with Utility Companies.

59 Q. Go ahead and explain what that is below there.

A. We have a set-up here below, here is another memorandum, Memphis Natural Gas Co. six sales contracts, one each, Arkansas Power & Light, Louisiana Power & Light, Mississippi Power & Light, West Tennessee Power & Light, [fol. 443] and two Memphis Power & Light contracts. Now we have a set-up here on the officers and directors.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 15 of his deposition, beginning with:

"by Moody's Manual percentage of the stock in 1928 that the * * *"

and ending:

"A. We have a set-up here below, here is another memorandum, Memphis Natural Gas Co. six sales contracts, one each, Arkansas Power & Light, Louisiana Power & Light, Mississippi Power & Light, West Tennessee Power & Light, and two Memphis Power & Light contracts. Now we have a set-up here on the officers and directors."

being part of Question 54 and answers through Answer to Question 59. Said testimony, being all of the testimony of [fol. 444] said witness on said page 15, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

60 Q. Just explain that.

[fol. 445] A. The Electric Bond & Share Co. officials, S. Z. Mitchell, Chairman & Director.

61 Q. Follow Mitchell on through to show what companies he is connected with, if any.

A. He is director in the Electric Power & Light, he is Chairman and Director in the National Power & Light, and he is a Director in the Memphis Power & Light.

62 Q. All right. What is the next one?

A. The next one is C. E. Groesbeck. He is President and Director of the Electric Bond and Share, and Director in the Electric Power & Light; President and director in the Industrial Gas Corporation; Vice Chairman and Director in National Power & Light; Director in the Arkansas Power & Light; Director in the Louisiana Power & Light; Director in the Mississippi Power & Light, and director in the Memphis Power & Light. H. C. Abell, he is Vice President and Director of the Electric Bond & Share, Director in Electric Power & Light; President and Director in National Power & Light; Director in Arkansas Power & Light; Director in Louisiana Power & Light; Director in Mississippi Power & [fol. 446] Light; and Chairman and Director of Memphis Power & Light, and Director in the Memphis Natural Gas Co. E. W. Hill, Vice President and Director in the Electric Bond & Share Co., Vice President of National Power & Light; Vice President & Director in Memphis Power & Light. H. L. Martin,

Exception to Evidence

Comes the Complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 16 of his deposition, beginning with:

"60 Q. Just explain that."

and ending:

"A. The next one is C. E. Groesbeck. He is President and Director of the Electric Bond and Share, and Director in the Electric Power & Light; President and director in the Industrial Gas Corporation; Vice Chairman and Director in National Power & Light; Director in the Arkansas Power & Light; Director in the Louisiana Power & Light; Director in the Mississippi Power & Light, and director in [fol. 447] the Memphis Power & Light. H. C. Abell, he is Vice President and Director of the Electric Bond & Share,

Director in Electric Power & Light; President and Director in National Power & Light; Director in Arkansas Power & Light; Director in Louisiana Power & Light; Director in Mississippi Power & Light; and Chairman and Director of Memphis Power & Light, and Director in the Memphis Natural Gas Co. E. W. Hill, Vice President and Director in the Electric Bond & Share Co., Vice President of National Power & Light; Vice President & Director in Memphis Power & Light. H. L. Martin,"

being Question 60 and answers through part of Answer to Question 62. Said testimony, being all of the testimony of said witness on said page 16, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

[fol. 448]

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors, for Complainant.

he is secretary in the Industrial Gas Corporation, he is Assistant Secretary in the National Power & Light, he is Assistant Secretary in the Memphis Power & Light; O. H. Simonds, he is director in the Mississippi Power & Light, and Director in the Memphis Power & Light, and Director [fol. 449] in the Memphis Natural Gas Co. L. H. Parkhurst is Vice President and Director in Electric Bond & Share Co., Vice President Arkansas Power & Light; Vice President Mississippi Power & Light, Vice President Memphis Power & Light; A. C. Ray, Vice President Electric Bond & Share Co., and Treasurer of the National Power

& Light, he is Assistant Treasurer of the Memphis Power & Light. E. P. Summerson, Secretary Electric Bond & Share Co., Director in Electric Power & Light, Secretary of National Power & Light; he is an officer in the Arkansas Power & Light; he is Assistant Secretary of the Memphis Power & Light. F. Odlum is Vice President of the Electric Bond & Share, Vice President National Power & Light; he is Director in the Memphis Power & Light. M. S. Ginswanger, Chairman and Director of the Memphis Natural Gas Co., B. L. John'on, Vice President of Memphis Natural Gas Co.; P. B. Sawyer, Vice President and Director of the National Power & Light.

63 Q. Now, if I understand you, those are all shown on this plat or chart, on the same paper with the chart or diagram that you explained in the first part of your testimony? [fol. 450] A. Yes, sir.

64 Q. What does the word, or the abbreviation "Chmn." mean?

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 17 of his deposition, beginning with:

"he is secretary in the Industrial Gas Corporation, he is Assistant Secretary in the National Power & Light, he is Assistant Secretary in the Memphis Power & Light; O. H. Simonds, he is director in the Mississippi Power & Light, and Director in the Memphis Power & Light, and Director in the Memphis Natural Gas Co. L. H. Parkhurst is Vice President and Director in Electric Bond & Share Co., Vice President Arkansas Power & Light; Vice President [fol. 451] Mississippi Power & Light, Vice President Memphis Power & Light; A. C. Ray, Vice President Electric Bond & Share Co., and Treasurer of the National Power & Light, he is Assistant Treasurer of the Memphis Power & Light, E. P. Summerson, Secretary Electric Bond & Share Co., Director in Electric Power & Light, Secretary of National Power & Light; he is an officer in the Arkansas Power & Light; he is Assistant Secretary of the Memphis Power & Light. F. Odlum is Vice President of the Electric Bond & Share, Vice President National Power & Light; he is Director in the Memphis Power & Light. M. S. Binswanger,

Chairman and Director of the Memphis Natural Gas Co., B. L. Johnson, Vice President of Memphis Natural Gas Co.; P. B. Sawyer, Vice President and Director of the National Power & Light."

and ending:

"64 Q. What does the word, or the abbreviation 'Chmn.' mean?"

[fol. 452] being part of the Answer to Question 62 and answers through Question 64. Said testimony, being all of the testimony of said witness on said page 17, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because is is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 453] A. Chairman.

65 Q. Chairman of the Board of Directors?

A. Yes, sir.

66 Q. What does the letter "D" on this chart stand for?

A. Director.

67 Q. What does the word "P" that you have on there, the letter "P", abbreviation, stand for?

A. It is President and Director.

68 Q. What does "V. P." stand for?

A. Vice President.

69 —. What does the abbreviation "Asst. Sec." stand for?

A. Assistant Secretary.

70 Q. And "Treas."?

A. Treasurer.

71 Q. "V. P."?

A. Vice President.

[fol. 454] 72 Q. And on this chart where you have these names of officials of the Companies you have, I notice, in different columns, abbreviations. What does "Elec. Ed. & S." stand for?

A. Electric Bond & Share Co.

73 Q. I will ask you if the abbreviation which you have, "Ele. P. & L." stands for Electric Power & Light, and "Ind. Gas. Co."?

A. That is the abbreviation for Industrial Gas Corporation.

74 Q. And "Nat. P. & L." is the abbreviation for National Power & Light Co., and "Ark. P. & L. for Arkansas Power & Light Co.;

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 18 of his deposition, beginning with:

"A. Chairman."

[fol. 455] and ending:

"74 Q. And 'Nat. P. & L.' is the abbreviation for National Power & Light Co., and 'Ark. P. & L. for Arkansas Power & Light Co.;"

being Answer to Question 64 and answers through part of Question 74. Said testimony, being all of the testimony of said witness on said page 18, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and [fol. 456] opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

"La. P. & L." for Louisiana Power & Light Co.; "Miss. P. & L." for Mississippi Power & Loght Co.; "Mem. P. & L.", for Memphis Power & Light Co.; "W. Tenn. P. & L." for West Tennessee Power & Light Co., and "Mem. N. G. Co." for Memphis Natural Gas Co.,—now state whether or not I have correctly stated what those abbreviations stand for?

A. That is correct.

75 Q. It being agreed by Mr. Armstrong that the question could be asked in this form without objection. I will ask you now to please file this chart, and this information that you have for 1928 as Exhibit A to your deposition, and make it a part of the same.

A. Yes, sir, I do.

[fol. 457] 76 Q. Now state whether or not you have also prepared a chart of comparatively the same type of information for the year 1932?

A. I have, yes, sir.

77 Q. Please take this chart which you have prepared for 1932, and start with the beginning, which you have on the top of the page, a line showing Electric Bond & Share Co., No. 2 Rector St., New York, and explain just what that map or chart shows.

A. Beginning with the Electric Bond & Share Co., the Manual shows that the Electric Bond & Share Co. controls and supervises Electric Power & Light Corporation. They own 59.34%——

78 Q. Pardon me for breaking in. What you are testifying about now, if I understand you, is all confined to the year 1932?

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beer-

man, as same appears on page 19 of his deposition, beginning with:

[fol. 458] "'La. P. & L.' for Louisiana Power & Light Co.; 'Miss. P. & L.' for Mississippi Power & Light Co.; 'Mem. P. & L.' for Memphis Power & Light Co.; 'W. Tenn. P. & L.' for West Tennessee Power & Light Co., and 'Mem. N. G. Co.' for Memphis Natural Gas Co.,—now state whether or not I have correctly stated what those abbreviations stand for?"

and ending:

"78 Q. Pardon me for breaking in. What you are testifying about now, if I understand you, is all confined to the year 1932?"

being part of Question 74 and through Question 78, including Exhibit "A" to said deposition. Said testimony, including Exhibit "A", being all of the testimony of said witness on said page 19, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the [fol. 459] best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

A. Yes, sir.

79 Q. Go ahead.

[fol. 460] A. In turn the Electric Power & Light Corporation own Arkansas Power & Light 100%; Louisiana Power & Light 100%; Mississippi Power & Light Co. 100%; and

control the voting stock of the United Gas Corporation. And it follows that United Gas Corporation to the United Gas Public Service Co., which have eight subsidiaries, own and control——

80 Q. Let me ask you right there, what percentage the United Gas Corporation own of the stock of the United Gas Public Service Company?

A. One hundred per cent.

81 Q. Just a moment. What Company, if any, owns the voting stock control of United Gas Corporation?

A. This voting stock is tied in with the Arkansas Power & Light, Louisiana Power & Light, Mississippi Power & Light, through the Electric Power & Light.

82 Q. Then, if I understand you, your chart shows that the Electric Power & Light Corporation owns a controlling voting sotck of the United Gas Corporation?

A. Of the United Gas Corporation.

[fol. 461] 83 Q. Is that shown on your plat?

A. Yes, sir, that shows right there, there is the star going down.

84 Q. That line connecting the two names?

A. Yes, sir.

85 Q. Go ahead.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 20 of his deposition, beginning with:—

"A. Yes, sir."

and ending:

"85 Q. Go ahead."

being Answer to Question 78 and answers through Question 85. Said testimony, being all of the testimony of said witness on said page 20, is objected to on the following [fol. 462] grounds:—

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

A. We will take the Electric Bond & Share Co. controls and supervises the National Power & Light Corporation, [fol. 463] and own 46.59 of the stock. In turn, the National Power & Light Co. own the Memphis Power & Light 99.9% and West Tennessee Power & Light 100%. Now the Memphis Natural Gas Co. have sales contracts with the Arkansas Power & Light, Louisiana Power & Light, and the Mississippi Power & Light, and also sales contract, the two of them, with the Memphis Power & Light, and one West Tennessee Power & Light.

86 Q. Now what per cent of the stock of the Memphis Natural Gas Co. did the Natural Power & Light Co. control in 1932, as shown?

A. Sixteen and three tenths per cent.

87 Q. All right, go ahead.

A. Now from the Memphis Natural Gas Co. there is a management contract with the Appalachian Management & Engineering Corporation, which is owned 100%.

88 Q. By what?

A. By the Memphis Natural Gas. This company is owned by the Appalachian Gas Corporation right here. There is an addiljation here with the Memphis Natural Gas Co., with Appalachian Gas Corporation.

[fol. 464] 89 Q. With whom did the Memphis Natural Gas Co. have a contract from which it purchased its natural gas in 1932?

A. United Gas Public Service Co., 100%.

90 Q. One hundred per cent owned by whom?

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 21 of his deposition, beginning with:

"A. We will take the Electric Bond & Share Co. controls and supervises the Natural Power & Light Corporation, and own 46.5% of the stock. In turn, the Natural Power & Light Co. own the Memphis Power & Light 99.9%, and West Tennessee Power & Light 100%. Now the Memphis Natural Gas Co. have sales contracts with the Arkansas Power & Light, Louisiana Power & Light, and the Mississippi Power & Light, and also sales contract, the two of [fol. 465] them, with the Memphis Power & Light, and one West Tennessee Power & Light."

and ending:

"90 Q. One hundred per cent owned by whom?" being Answer to Question 85 and answers through Question 90. Said testimony, being all of the testimony of said witness on said page 21, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and [fol. 466] opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

A. Memphis Natural Gas Corporation.
91 Q. No, I am talking about, Mr. Beerman——

A. Owned by the Natural Gas Corporation, by the Public Service, that is, the Public Service Corporation.

92 Q. Then your plat shows, if I understand you, that the Memphis Natural Gas Co. purchased its natural gas in 1932 from the United Gas Public Service Co.?

A. Yes, sir.

93 Q. Your plat shows that, does it?

A. Yes, sir, it has a purchase contract with this Memphis Natural Gas Co.

94 Q. Now what is the notation you have below there, what does that mean, and what is it?

[fol. 467] A. Electric Bond & Share Co. acts in advisory and supplies technical and financial assistance to the utility companies.

95 Q. Designate the Companies other than that, the ones you have shown on the plat there?

A. With the Companies as shown on this plat, because it is the parent Company.

96 Q. What are the notations you have below, giving names and letters and abbreviations opposite their names, in certain columns there, what does that mean, and what is it?

A. That represents the officers and directors of the various Companies.

97 Q. Now without reading those, have you, or not, checked those, and does that map correctly show the information that is

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 22 of his deposition, beginning with:

[fol. 468] "A. Memphis Natural Gas Corporation."

and ending:

"97 Q. Now without reading those, have you, or not checked those, and does that map correctly show the information that is"

being Answer to Question 90 and answers through part of Question 97. Said testimony, being all of the testimony

of said witness on said page 22, is objected to on the following grounds;

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

[fol. 469] Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

shown of that map?

A. This map shows practically what has been explained in the 1928 set-up.

98 Q. What I am asking is whether or not it is correct, whether you have checked it, and you know it is correct?

A. This has been checked back, and shown to be correct as to officers and directors in the various companies.

99 Q. And the same abbrev-ations used there mean the same thing as used on Exhibit A to your deposition—is that right?

A. Yes, sir.

100 Q. Then I will ask you to file this chart, plat, map, [fol. 470] which you have presented for the year 1932 as Exhibit B to your deposition?

A. Yes, sir.

101 Q. Did you, or not, prepare and have in your possession the same type of chart or map and information covering the year of 1933?

A. Just the same type of information; however, this has been consolidated, 1933-4-5.

102 Q. Then the one you have before you now covers the years 1933-1934-1935?

A. Yes, sir.

103 Q. Please explain that, beginning at the top.

A. Beginning with the Electric Bond & Share Co. the chart shows that controls and supervises Electric Power & Light Corporation, in 1933, owns 58.24%..

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 23 of his deposition, [fol. 471] beginning with:

"shown on that map?"

and ending:

"A. Beginning with the Electric Bond & Share Co. the chart shows that controls and supervises Electric Power & Light Corporation, in 1933, owns 58.24%."

being part of Question 97 and through Answer to Question 103, including Exhibit "B" to said deposition. Said testimony, including Exhibit "B", being all of the testimony of said witness on said page 23, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

[fol. 472]

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

104 Q. What owns of what that percent?

A. They own that much stock in there, Electric Power & Light.

105 Q. What owns it, who owns it?

A. The Electric Bond & Share Co.

106 Q. You know "they" don't mean anything in a deposition.

A. I understand.

107 Q. Go ahead. If I understand you, the Electric Bond & Share Co. in 1933 owned, as your chart shows, 58.24% of the Electric Power & Light Co.?

A. Yes, sir; and in 1934, 57.92; in 1935 they owned 57.76.

[fol. 473] 108 Q. That is, of the Electric Power & Light?

A. Stock, yes, sir.

109 Q. All right; go ahead.

A. The Electric Power & Light Co. controls the Arkansas Power & Light 100%.

110 Q. What do you mean "controls?"

A. Well, it owns the Arkansas Power & Light 100%; they also own the Louisiana Power & Light 100%, they also own the Mississippi Power & Light 100%.

111 Q. Does that percentage of ownership apply to the three years, 1933, 1934, and 1935?

A. Yes, sir.

112 Q. Go ahead.

A. Now United Gas Corporation——

113 Q. What is its connection, if any, with the Electric Power & Light Co.?

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. [fol. 474] Beerman, as same appears on page 24 of his deposition, beginning with:

"104 Q. What owns of what that per cent?"

and ending:

"113 Q. What is its connection, if any, with the Electric Power & Light Co.?"

being Question 104 and answers through Question 113. Said testimony, being all of the testimony of said witness on said page 24, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

[fol. 475]

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

A. The United Gas Corporation, they control, the voting stock is controlled in all these years, 1933, 1934, 1935.

114 Q. By whom?

A. By the Electric Power & Light Co. Now going from the United Gas Corporation down to the United Gas Public Service Co., they have a purchase contract with the Memphis Natural Gas Co.

115 Q. Through which the Memphis Natural Gas Co. purchases its gas?

A. Yes, sir. There is 100% of that owned by the United Gas.

[fol. 476] 116. Q. One hundred percent of what owned, Mr. Beerman?

A. United Gas Public Service Company.

117 Q. Is owned by who?

A. Is owned 100% by the United Gas Corporation, and there are eight subsidiary companies owned and controlled.

118 Q. By whom?

A. By the United Gas Public Services Co., they produce 72%, and purchase about 28.

119 Q. Of what?

A. Of the gas.

120 Q. Control of the Memphis Power & Light?

A. Yes, sir. Going from the Electric Bond & Share Co. I find that that controls the Ebasco Service Company 100%, organized in 1935.

121 Q. That is owned 100% by whom?

A. By the Electric Bond & Share Company. The Electric Bond & Share Co. controls and supervises the National [fol. 477] Power & Light Corpora——

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 25 of his deposition, beginning with:

"A. The United Gas Corporation, they control, the voting stock is controlled in all these years, 1933, 1934, 1935".

and ending:

"A. By the Electric Bond & Share Company. The Electric Bond & Share Co. controls and supervises the National Power & Light Corporat——".

being Answer to Question 113 and answers through part of Answer to Question 121. Said testimony, being all of the testimony of said witness on said page 25, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

[fol. 478] II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

tion, the ownership of the stock in 1933, is 46.56, 1934, it is 46.56, 1935 it is 46.56.

122 Q. Now the ownership of the stock of what, and by whom?

A. The ownership of Electric Bond & Share Co.

123 Q. Of the stock of what?

A. Of the stock of the National Power & Light Corpora-
[fol. 479] tion. Going further, the West Tennessee Power & Light and the Memphis Power & Light is owned by the National Power & Light Corporation.

124 Q. What percentage of stock?

A. West Tennessee Power & Light 100%, and the Memphis Power & Light, 99.9%; the Memphis Natural Gas Co. has a sales contract with the Arkansas Power & Light Co., Louisiana Power & Light Co., the Mississippi Power & Light Co., and also two contracts Memphis Power & Light and the West Tennessee Power & Light.

125 Q. Well, now, the two contracts for sale of the Memphis Natural Gas is with the Memphis Power & Light Co., and one with the West Tennessee Power & Light Co., and one with the West Tennessee Power & Light,—is that what you mean?

A. That is what I mean, yes, sir.

126 Q. It looks to me like your map shows it the other way, may be I am wrong—or not?

A. The sales contract of the two, that runs back over here, runs, on that, with the Memphis Power & Light Co.
[fol. 480] 127 Q. All right.

A. The Memphis Power & Light own the Memphis Street Railway 100%.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 26 of his deposition, beginning with:

"tion, the ownership of the stock in 1933 is 46.56, 1934, it is 46.56, 1935 it is 46.56.

and ending:

"A The Memphis Power & Light own the Memphis Street Railway 100%."

being part of answer to Question 121 and answers through part of Answer to Question 127. Said testimony, being all of the testimony of said witness on said page 26, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the [fol. 481] best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

I just put in that to show——

128 Q. Who owns that stock, do you know, of the Commonwealth Gas System, Inc.?

[fol. 482] A. It comes with the Commonwealth Gas Corporation.

129 Q. Who owns that stock, do you know, of the Commonwealth Gas System, Inc.?

A. It comes with the Commonwealth Gas Corporation.

130 Q. The Commonwealth Gas Corporation owns the——

A. They organized this corporation here.

131 Q. The Commonwealth Gas System, Inc., 100%, is that right?

A. Yes, sir, and the Commonwealth Gas Corporation is affiliated with the Memphis Natural Gas Co., which is owned 47.96% by the Commonwealth Gas Corporation. And they also own the West Virginia Gas Corporation, the Commonwealth owns the West Virginia Gas Corporation 98.5%.

132 Q. I will ask you whether or not your plat and the information that you have from which you can testify, whether or not the Natural Power & Light Co. owns any stock of the Memphis Natural Gas Co. during these years 1933, 1934 and 1935?

A. They do, to the extent of 16.3%.

[fol. 483] 133 Q. That covers those three years?

A. Yes, sir, the chart shows that.

134 Q. That is what I am asking. What is the information you have at the bottom, the writing or printing on the plat?

A. Arkansas Power & Light Co. hold note against the Memphis Natural Gas Co., $120,000, 1932, 1933, 1934, 1935, secured by 19.85 miles.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 27 of his deposition, beginning with:

"I just put in that to show——"

and ending:

"A. Arkansas Power & Light Co. hold note against the [fol. 484] Memphis Natural Gas Co., $120,000, 1932, 1933, 1934, 1935, secured by 19.85 miles."

being part of Answer to Question 127 and answers through part of Answer to Question 134. Said testimony, being all of the testimony of said witness on said page 27, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

[fol. 485] W. P. Armstrong, T. A. McEachern, Jr.,
Solicitors for Complainant.

of pipe line. Electric Bond & Share Co. advisory capacity, supervises, supplies technical and financial assistance to

the utility companies, fee 1.1% of gross earnings. The Ebasco Service Co., organized in 1935, for technical service contracts with affiliates of Electric Bond & Share Co. Commonwealth Gas Corporation, organized 7/15/1933, supplanting the Appalachian Gas Corporation.

135 Q. Now I will get you to state whether or not there is shown on the back of this same paper that you have been testifying from any other information,—to shorten it, as suggested by Mr. Armstrong, it shows the officers and directors of different companies for the year 1933, 1934, 1935,—that is correct, is it?

A. Yes, sir.

136 Q. State whether or not the same letters and abbreviations are used there as were used and explained hereinbefore in your deposition?

[fol. 486] A. Exactly the same, yes sir.

137 Q. I will ask you to please file that chart, including all the information thereon, which you have identified as Exhibit C to your deposition, and make it a part of the same.

A. I do.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as same appears on page 28 of his deposition, beginning with:

"of pipe line. Electric Bond & Share Co. advosiry capacity, supervises, supplies technical and financial assistance to the utility companies, fee 1.1% of gross earnings. The Ebasco Service Co., organized in 1935, for technical service contracts with alliliates of Electric Bond & Share Co. Commonwealth Gas Corporation, organized 7/15/1933, supplanting the Appalachian Gas Corporation."

[fol. 487] and ending:

"A. I do."

being part of Answer to Question 134 and answers through Answer to Question 137, including Exhibit "C" to said deposition. Said testimony, including Exhibit "C", being all of the testimony of said witness on said page 28, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and [fol. 488] opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

Cross-examination.

By Mr. Armstrong:

138 Q. Mr. Beerman, I think I perfectly understand your testimony, I understand that you took Moody's Manual and transferred the information you obtained from it with reference to these companies to chart from, which you present as Exhibits A, B, and C to your testimony,—is that right?

A. Yes, sir, secured it from the manual itself.

139 Q. And the only source of your information, as disclosed by your testimony and shown on the chart, is Moody's Manual?

A. Moody's Manual.

[fol. 489] 140 Q. And to make it perfectly clear, of course you have no personal knowledge, that is, in the way of having seen contracts between these Companies, or their stock books, or being familiar with their operations, except what you glean from Moody's Manual? Is that right?

A. Yes, sir, and Moody's Manual explains from the management on down to the operations and all, which I secured all the information from; I had never seen any of these contracts, therefore, the information is secured from the manual alone, which is a public record.

141 Q. You say it is a public record. You don't mean that Moody's Manual is an official publication of any governmental body, of course?

A. I mean that it is subject to examination by the public, if they want to see it.

142 Q. Open to the public?

A. Yes, sir.

143 Q. Now, then, taking Exhibit A, I notice you say that in 1928 the Electric Bond & Share Co., of No. 2 Rector Street, owned 18% of the stock of the Electric Power & [fol. 490] Light Co., then you have a line from the Electric Bond & Share Co. down to the Electric Power & Light Co., and on that line you have written "controlled and supervises".

A. Controlled and supervises, yes, sir.

144 Q. So that, during that year, according to your chart, is shown a stock ownership of the small minority 18%, and you have added, "Controlled and supervises",—do you get that from the type of Moody's Manual?

A. Moody's Manual shows that it controlled and supervises the Electric Bond & Share Co., that is all there.

145 Q. And the only information you have about any control or supervision, as shown by this chart, Exhibit A, is the reading matter you read in Moody's Manual?

A. Taken from the manual.

146 Q. I see. These dates, for instance, in your chart, Exhibit A, which purports to cover the year 1928, does Moody's Manual show the date the various officers and directors were officers and directors, as shown on the bottom of your chart, or not?

[fol. 491] A. It would only show that they were, just as you see on that, enumerated on this chart here, officers and directors. It does not show any date in there as to any meetings that were held.

147 Q. The point I am making, though, is this chart, Exhibit A, taken from Moody's Manual of what year?

A. Of 1929, referring to the calendar year 1928.

148 Q. That is what I am trying to find out—you have a line here from the Electric Power——

A. I can explain that a little further on that other question if you want to, about the 1929 and 1928, so it won't be misunderstood.

149 Q. It is all right, so far as I am concerned.

A. The Electric Bond & Share Co., organized there and incorporated as a corporation, effective March 12, 1929, I got that information here——

150 Q. You show on this chart, Exhibit A, 1928, line from the Electric Power & Light to the Industrial Gas Corporation, with the wording or reading matter, "Affiliated and controlled?"

A. Yes, sir.

[fol. 492] 151 Q. You don't know, and Moody's Manual does not show the nature of that affiliation, or extent of that control, does it?

A. You will only find that from the books of the Company, which disclose all matters of that character; it properly would not be shown in detail by a manual.

152 Q. And is not so shown?

A. I did not discover it. I don't know to what extent, it merely says "Affiliate."

153 Q. Of course you haven't had access to the books of any of these Companies?

A. No, sir, not yet.

154 Q. Now, then, you show a line on this Exhibit A, Electric Bond & Share Co. acts in supervisory capacity, supplies technical and financial assistance, business development and operations of utility companies?

A. Yes, sir.

155 Q. That is its general business?

A. Yes, sir.

156 Q. You do not mean to intimate by that, and Moody's Manual does not show that the Electric Bond & Share Co. [fol. 493] in 1928 supplied any financial assistance, business development, or supervision of the Memphis Natural Gas Co., do you?

A. Only to the extent of the percentages of stock owned and the history of the concern to some extent, and the management, and the operations, and the subsidiaries, they set all this up in the manual.

157 Q. But the point I am making, there is nothing in the Manual for 1928, or any other year, that you examined, showing or indicating any management contract, or anything of that kind, between the Memphis Natural Gas Co. and the Electric Bond & Share Co., is there?

A. No, sir.

158 Q. You searched for that, didn't you?

A. Yes, sir, I searched the manual for all information I could find, but as far as the contract would be concerned,

I have never laid my eyes on the original contract, and am bound to accept the evidence as shown in the Manual.

159 Q. What I am getting at, there is nothing in the Manual to indicate that any managing was done of the [fol. 494] Memphis Natural Gas Co. by the Electric Bond & Share Co., is there? And the only connecting link shown, aside from whatever weight may be given to the sales contract, is the stock ownership of 25%, as indicated on this plat?

A. Yes, sir, and that shows the ownership of all the corporations involved.

160 Q. I understand that—taking your plat, Exhibit B, just as in the other case, this is a charting of information you found in Moody's Manual?

A. Yes, sir.

161 Q. Just as the other one is; and as you say, when you put on the line between the Electric Bond & Share Co. to Electric Power & Light Co., controls and supervises, that is simply what you read in Moody's Manual?

A. Yes, sir.

162 Q. Now you show on that chart and you take that from Moody's Manual, too, I take it, a management contract between the Appalachian Management & Engineering Corporation and the Memphis Natural Gas—is that right?

A. Yes, sir, that is right.

[fol. 495] 163 Q. Now, then, you show on the same Exhibit B a line from the Memphis Natural Gas Co. to the Appalachian Gas Corporation?

A. It is affiliated with.

164 Q. What that affiliation was, you don't know the extent of the stock ownership between the two Companies?

A. I don't know the extent of it.

165 Q. Does not Moody's Manual show that?

A. No, sir, I guess it does show, though, that the Appalachian Gas Co. had 100% stock of the Appalachian Management & Engineering Corporation.

166 Q. Mr. Beerman, you also show on this chart, Exhibit B, the following reading matter, "Electric Bond & Share Co. acts in advisory and supplies technical and financial assistance, to Utility companies,"—I have read that correctly, haven't I?

A. Yes, sir.

167 Q. That is a statement of its general business, isn't it?

A. That is the general way of expressing the connection of the control and contracts, whatever it might be, they [fol. 496] express it, we take that in each case to define it, so the Manual shows literally that.

168 Q. What I am asking, though, is there nothing in the Manual for '32 that in any sense shows that the Electric Bond & Share Co. or National Power & Light Co., either, had any *am*nagement contract of any kind with the Memphis Natural Gas Co., is there?

A. It shows, and so stated in the Manual, that this management contract, going from the Memphis Natural Gas Co. to the Appalachian Management & Engineering Corporation, and that was organized for the purpose, I suppose, of conducting the business of the Appalachian Gas Corporation, they having owned 100% of the Appalachian Management & Engineering Corporation.

169 Q. Mr. Beerman, you haven't answered my question. Listen carefully to my question, please, sir. Your chart does not show, and it did not exist, Moody's Manaul did not show in 1932, that chart being Exhibit B, for that year, any management contract between the Memphis Natural Gas and the Appalachian Management & Engineering Corporation, and the Memphis Natural Gas Co. and the National Power & Light Co., did it?

A. It did not define in there the terms of the manage- [fol. 497] ment. It says there was a contract between the Memphis Natural Gas, what I mean is, the management shows, that these Companies were set up as a management corporation.

170 Q. Let me ask the question over again. Your chart, Exhibit B, for the year 1932, shows a management contract existing between the Memphis Natural Gas Co. and the Appalachian Management & Engineering Co., but does not show the details of that contract?

A. That is correct, it does not show the details of that.

171 Q. Now that same chart, Exhibit B, does not show any management contract existing between the Memphis Natural Gas Co. and the Memphis Power & Light Co.?

A. No.

172 Q. And does not refer to that?

A. Does not refer to that at all.

173 Q. And it does not show any management contract between Memphis Natural Gas Company and Memphis Power & Light Co.?

A. No, sir.

[fol. 498] 174 Q. Does it show the existence of any management contract between Memphis Natural Gas Co. and Electric Bond & Share Co.? Where does it show anything of that kind?

A. The chart does not say.

175 Q. The only management contract you show in existence is the one between the Memphis Natural Gas Co., so far as the Memphis Natural Gas Co., is concerned, is between that Company and the Appalachian Management & Engineering Corporation?

A. Yes, sir.

176 Q. Do you know whether there was any connection at all in 1932 between the Appalachian Gas Corporation and the Electric Bond & Share Co., and what I mean by connection, do you know whether either Company owned any stock in the other Company—you don't know about that; do you?

A. No, sir.

177 Q. Taking your chart, Exhibit C——

A. That Appalachian proposition was a short lived proposition.

178 Q. Taking your chart Exhibit C for the years 1933, [fol. 499] 1934, 1935, taking the Commonwealth Gas Corporation, you don't know whether, during those years, the Commonwealth Gas Corporation owned any stock in the Electric Bond & Share Company, or the Electric Bond & Share Co. owned any stock in the Commonwealth Gas Corporation, do you?

A. No records set up showing that.

179 Q. Moody's Manual does not show any such information?

A. Not that I know of.

180 Q. And Moody's Manual, during those years, does not show any stock ownership existing either way, between the Commonwealth Gas Corporation and Electric Power & Light Co., does it?

A. Moody's shows the Commonwealth is affiliated with the Memphis Natural Gas Co. to the extent of 49.67, and the Commonwealth Corporation owns the stock of the West Virginia Corporation to the extent of 98.5, you understand, and also owns Commonwealth Gas System, Incorporated, 100%, that is all owned by them, that is what the Manual shows.

181 Q. Mr. Beerman, I didn't want to interrupt you; you haven't answered my question. The Manual does not show, [fol. 500] for the years '33, '34, and '35, charted in your Exhibit C, that the Commonwealth Gas Corporation owned any stock in the National Power & Light, or that the National Power & Light Co., during those years, owned any stock in the Commonwealth Gas Co.?

A. We didn't state that showed. Does not show any ownership.

182 Q. Moody's Manual, for those years, 1933, 1934, 1935, does not show that during those years the Commonwealth Gas Corporation owned any stock in the Electric Bond & Share Co., or that the Electric Bond & Share Co., during those years, owned any stock in the Commonwealth Gas Corporation, does it?

A. The Electric Bond & Share Corporation supervises and controls, as stated here, in that capacity, financing, etc., which naturally follows they would have to do in the beginning.

Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. [fol. 501] Beerman, being on page 37 of his deposition, beginning with Question No. 182 and answer thereto, as follows:

"182 Q. Moody's Manual, for those years, 1933, 1934, 1935, does now show that during those years the Commonwealth Gas Corporatopm owned any stock in the Electric Bond & Share Co., or that the Electric Bond & Share Co., during those years, owned any stock in the Commonwealth Gas Corporation, does it?

A. The Electric Bond & Share Corporation supervises and controls, as stated here, in that capacity, financing, etc., which naturally follows they would have to do in the beginning.

The foregoing question and answer is objected to on the following grounds:

I

That the answer is not responsive to the question propounded.

II

That it is irrelevant and incompetent and is not the best [fol. 502] evidence, being hearsay.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

183 Q. You didn't answer my proposition.

A. Maybe I didn't——

184 Q. During those years 1933, 1934, 1935, charted in your Exhibit C, Moody's Manual, does not show—this is the only thing I am asking you—that the Commonwealth Gas Corporation owned any stock during those years in that Electric Bond & Share Co., does it?

[fol. 503] A. No, sir.

185 Q. It does not show, during those years, the Electric Bond & Share Corporation owned any stock in the Commonwealth Gas Corporation, does it?

A. No, sir.

186 Q. It does not show that there existed during those years any management contract between the Electric Bond & Share Co. and the Memphis Natural Gas Co., does it? Talking about direct management contract between Memphis Natural Gas Co. and Electric Bond & Share Co., it does not show it, does it?

A. It does not show direct contract, but shows contracts with other concerns that this contract controls.

187 Q. I understand, but no management contract?

A. No, I don't know of any management contract.

188 Q. The only management contract that your Exhibit C for the years 1933, 1934, 1935 shows in which the Memphis Natural Gas Co. was interested, was management contract between it and the Commonwealth Gas System, Incorporated?

A. Yes, sir.

[fol. 504] 189 Q. So far as the Manual shows, the Electric Bond & Share Co. group, we will call it, had no financial interest in the Commonwealth Gas System or Commonwealth Gas Corporation, no stock ownership in either one?

A. Do you mean to say the Memphis Natural Gas Co., through this management contract, was not connected with these?

190 Q. What I asked you, the years 1933, 1934, 1935, charted as your Exhibit C, shows management contract between Memphis Natural Gas Co., and Commonwealth System, and that is the only management contract shown in which the Memphis Natural Gas Co. was interested?

A. Yes, sir.

191 Q. Now the other party in that contract was the Commonwealth Gas System, Inc., which you show to have been owned during those years 100% by the Commonwealth Gas Corporation?

A. Yes, sir.

192. But the Moody's Manual does not show, and your chart does not show that either the Commonwealth Gas [fol. 505] Corporation or Commonwealth Gas System owned any stock in the Electric Bond & Share Co. or National Power & Light Co., or the Ebasco Service, does it?

A. Not to my knowledge.

193 Q. It does not show that the Electric Bond & Share Corporation the Ebasco Service, or National Power & Light Co. owned any stock in either the Commonwealth Gas Corporation or Commonwealth Gas System, Inc., does it?

A. Not to my knowledge. The Commonwealth Gas Co. came in the year 1935, I believe it did, I want to show you something on that. It is stated down here that the Commonwealth Gas Corporation organized in 1933, supplanted the Appalachian Gas Corporation. That is in connection with the question you just asked me.

194 Q. Don't you know of your own knowledge, leaving these charts aside, for the moment, that the Appalachian Gas Corporation and the Commonwealth Gas Corporation were neither connected, in that the Commonwealth succeeded the Appalachian, you know that, don't you?

A. Yes, sir.

[fol. 506] 195 Q. Don't you know, as a matter of fact, that the Appalachian Gas Corporation and the Commonwealth

on the one side, and the Electric Bond & Share Co. group of properties on the other side, are entirely distinct and disconnected group of property owners, don't you know that?

A. Only their being supervised and controlled, as it states, it is the parent company—you said the Electric Bond & Share, did you not?

196 Q. Yes.

A. Well, it is the parent Company.

197 Q. Do you mean to say that the Electric Bond & Share Company is or has ever been the parent company of the Commonwealth Gas Corporation?

A. It would be so with the control that would go from the other companies down to the others that go in with the whole organization.

198 Q. What common director, or what management contract, or what contract of any kind, or what stock ownership of any kind has ever existed between the Appalachian [fol. 507] Gas Corporation and the Electric Bond & Share Co.?

A. I don't know of any.

199 Q. Don't you know, as a matter of fact, of your own knowledge, that they are entirely distinct?

A. No, sir, I don't know that of my own knowledge.

200 Q. Let me finish my question—they are entirely distinct and separate, an unconnected group of corporations, just as disconnected as the Electric Bond & Share Co., group and the Commonwealth and Southern group—don't you know that?

A. I don't know it to a full extent.

201 Q. That is your information, though, isn't it?

A. I don't know it to the full extent.

202 Q. Does Moody's Manual show the date that various officers and directors were elected—does Moody's Manual show the date the officers were elected?

A. No, sir, it does not show the date, but that they were elected.

[fol. 508] 203 Q. So that, for instance, the 1929 Moody's Manual, which gives the officers and directors for the preceding calendar year of 1928, does not show when those officers and directors for that calendar year of 1928 were elected, does it?

A. Does not show.

204 Q. Does not show any date of the meeting?
A. No, sir.

Further this deponent saith not.

F. O. Beerman, by Grace Dawson, Reporter.

Sworn to before me when given, This 21st day of December, 1938. Grace Dawson, Notary Public. (Seal.)

Tax, Notary Fee $1.00.

[fol. 509] AGREEMENT AS TO EXHIBITS, ETC.

It is agreed that the defendant may file, and does herewith file the original letter of Roy H. Beeler, Attorney-General of Tennessee, addressed to W. S. Booton, April 21, 1938, with reference to matters involved in this case, as Exhibit D to the deposition of F. O. Beerman, and a copy of the letter addressed to Roy H. Beeler, Attorney-General, to Walter Stokes, Commissioner of Finance and Taxation of Tennessee, dated June 16, 1938, as Exhibit E, with reference to the same matters, and that no objection will be offered to either of said letters, except as to the question of competency and relevancy of the subject-matter thereof.

It is further agreed that the defendant, Hon. Lewis S. Pope, will furnish to complainant, to be filed by complainant as exhibits, copy of his contract with the Governor of the State, by virtue of which he acts, in this case, together with a copy of the supplemental contract evidencing his compensation to be received by him in this matter and other cases. There will be no exceptions to this by the defendant, except for competency and relevancy.

It is also agreed that the defendant, Lewis S. Pope, has been regularly appointed by the Governor of Tennessee as Lawyer and Investigator, and has been acting as such since [fol. 510] March, 1937, under the provisions of the Acts of Chapter 112, Public Acts of 1937.

[fol. 511] Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as the same appears as Exhibit "A", attached to and a part of his deposition.

Said Exhibit "A", being made a part of said deposition by witness' answer to Question 75 of said deposition, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

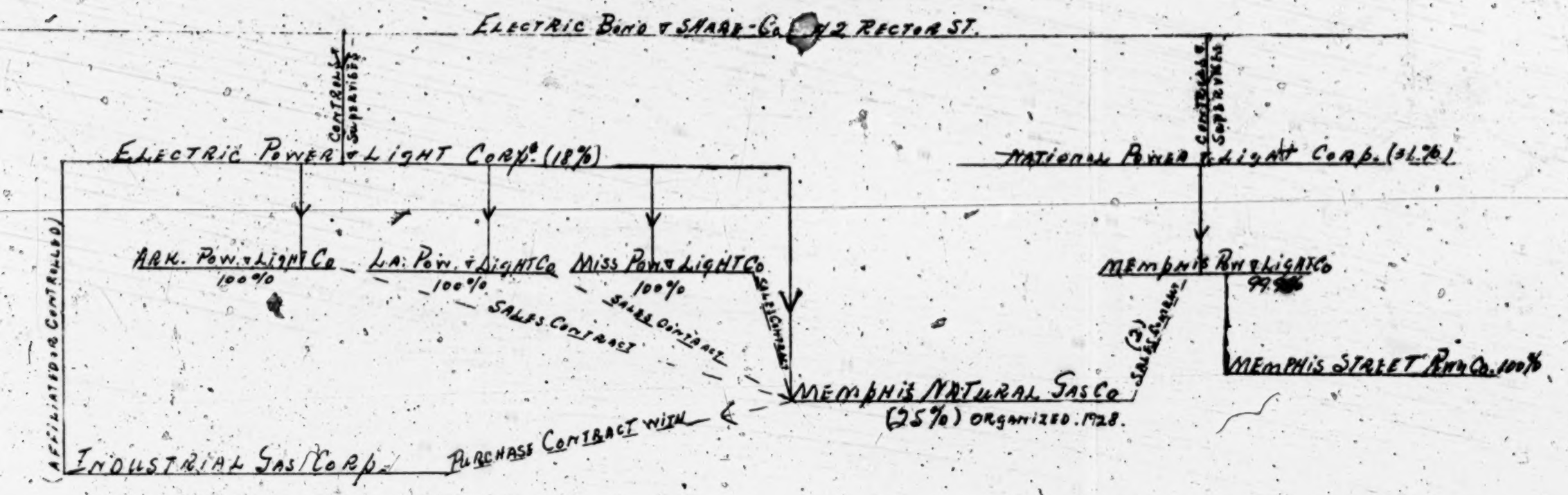
IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

de folio 511a)

Exhibit A
F. O. Beerman



ELECTRIC BOND & SHARE ACTS IN SUPERVISORY CAPACITY. SUPPLIES TECHNICAL & FINANCIAL ASSISTANCE, BUSINESS DEVELOPMENT & OPERATIONS OF U.S. & FOR. COMPANIES.

MEMPHIS NAT. GAS CO - 5 SALES CONTRACTS. 1 EACH - ARK PWR CO, LA PWR CO - MISS PWR CO. & (2) MEMPHIS PWR Cos

	ELEC. BDS	ELEC. POL	IND. SASC	NAT. PAL	ARK PAL	LA PAL	MISS PAL	MEM. PAL	[redacted]	MEM. N. SEC
S.Z. MITCHELL	CHM & D	D.		CHM. & D						
C.E. GROESBECK	P & D	D	P & D	V. CHM. D	D	D	D	D		
H.C. ABELL	V.P	D		PRES. D	D	D	D	CHM & D		D
EDW HILL	V.P			V.P.				V.P.		
H.L. MARTIN			SEC.	ASST. SEC.				ASST. SEC.		
O.H. SIMONDS							D	D		D
L.H. PARKHURST	V.P				V.P.		V.P	V.P		
A.C. RAY	TREAS			TREAS.				ASST TREAS		
E.P. SUMMERSON	SEC	SEC		SEC	OFFICER			ASST. SEC		
F.B. DOLLUM	V.P.			V.P				D		
M.S. BINSWANGER										CHM & D
R.L. JOHNSON										V.P.
P.B. SAWYER				V.P. & D						

Exhibit A.
H. O. Beerman.

[fol. 512] Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as the same appears as Exhibit "B", attached to and a part of his deposition.

Said Exhibit "B", being made a part of said deposition by witness' answer to Question 100 of said deposition, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

(Here follows 1 photolithograph, side folio 512a)

1932

276

Exhibit B
F. O. Beerman

ELECTRIC BOND & SHARE CO. 71 RECTOR ST. NEW YORK

ELECTRIC POWER & LIGHT CORP. (59.34%)

CONTROLS & SUPERVISES

ARK. POW & LIGHT CO. (100%)

LA. POW & LIGHT CO. (100%)

MISS POW & LIGHT CO. (100%)

SALES CONTRACT

SALES CONTRACT

SALES CONTRACT

CONTROLS VOTING STOCK

UNITED GAS CORP.

UNITED GAS PUBLIC SERVICE CO. (100%)

PURCHASE CONTRACT

EIGHT SUBSIDIARIES. (OWNED & CONTROLLED)

PRODUCE 72%

PURCHASE 28%

NATIONAL POWER & LIGHT CORP. (46.59%)

CONTROLS & SUPERVISES

MEMPHIS POWER & LIGHT CO (99.9%)

WEST TEXAS POWER & LIGHT CO (100%)

SALES CONTRACT (2)

SALES CONTRACT

MEMPHIS NATURAL GAS CO. 16.3%

MANAGEMENT CONTRACT WITH

AFFILIATED WITH

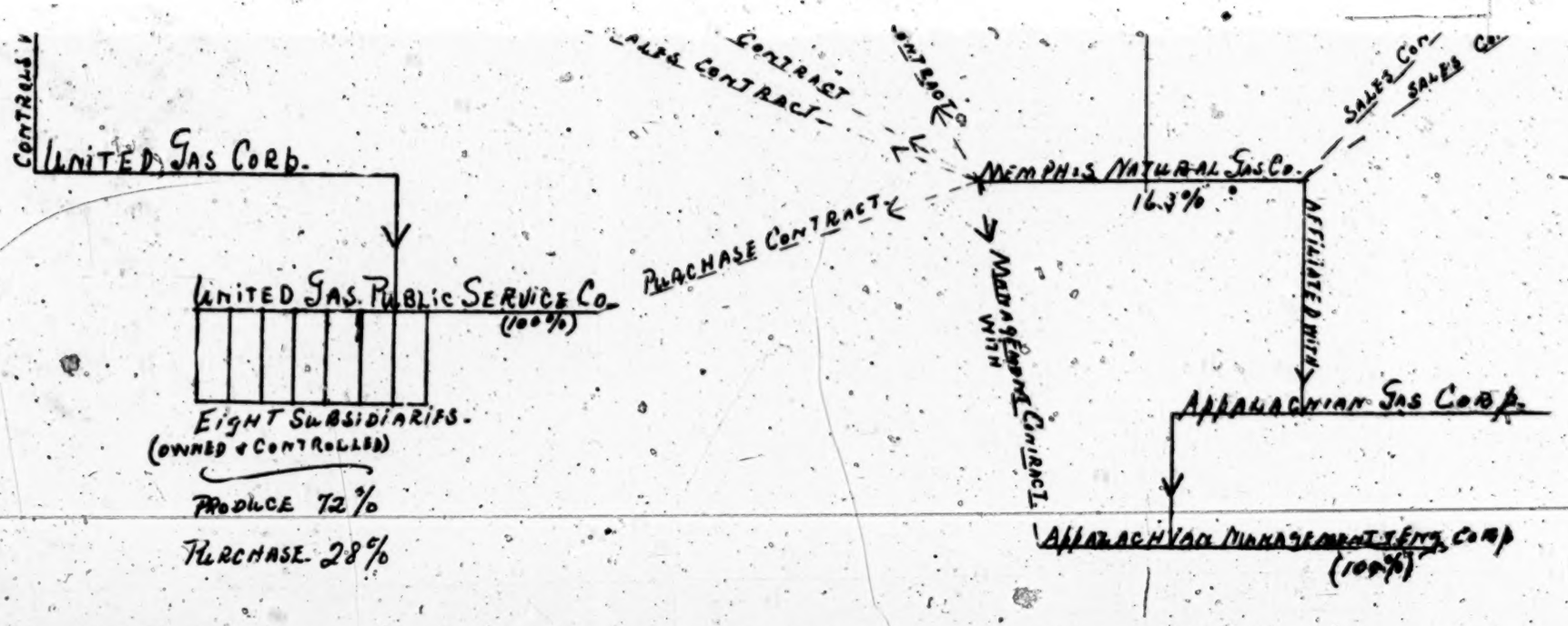
APPALACHIAN GAS CORP.

APPALACHIAN MANAGEMENT SERV. CORP (100%)

ELECTRIC BOND & SHARE CO ACTS IN ADVISORY SUPPLIES TECHNICAL & FINANCIAL ASSISTANCE TO UTILITY COMPANIES

1932

EL. BD&SH | EL. P&L | UNITED GC | ARK P&L | LA. P&L | MISS P&L | NAT'L P&L | MEMPHIS P&L | MPS N.S. Co | MPS ST. RWC



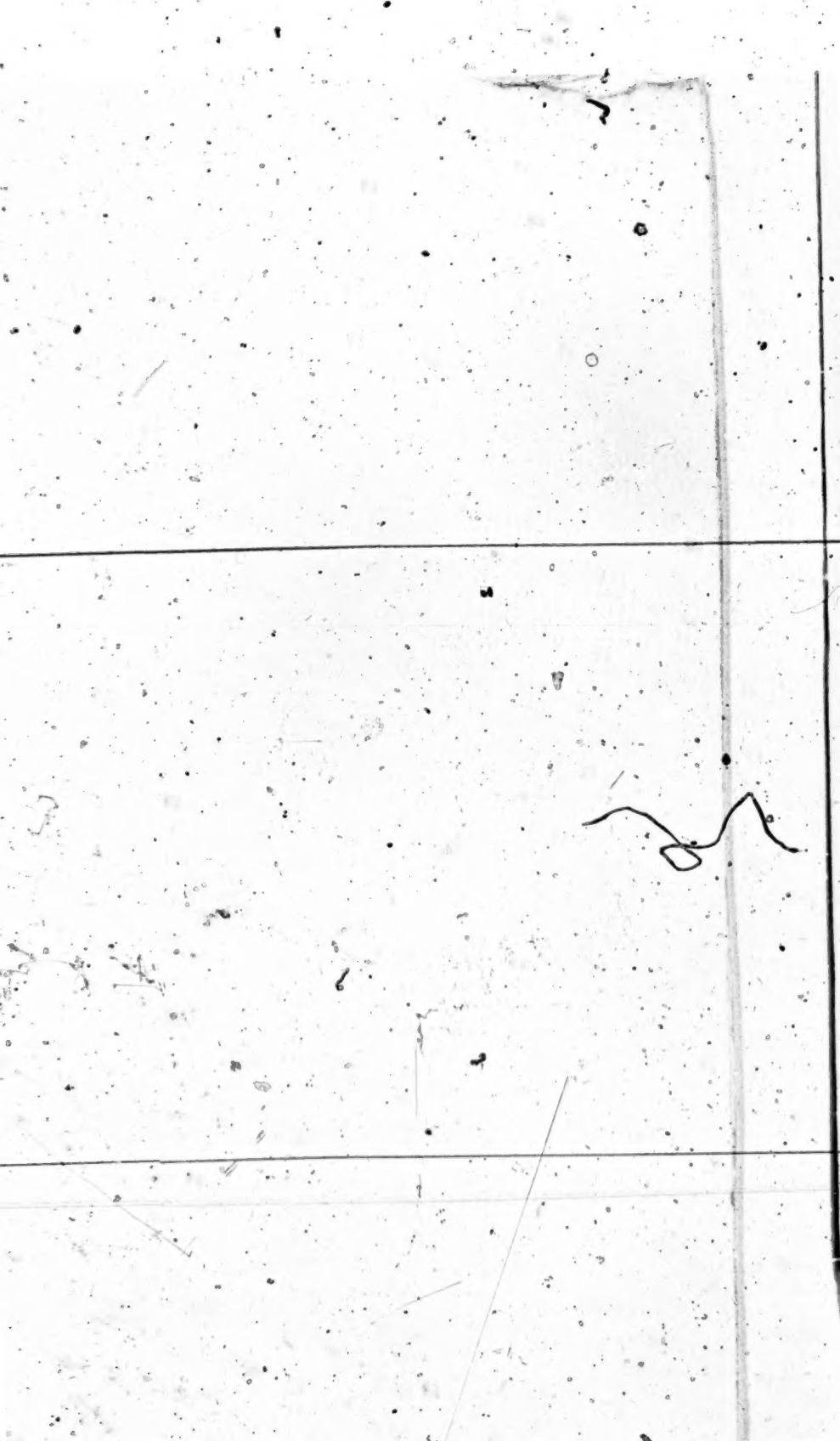
ELECTRIC BOND & SHARE CO ACTS IN ADVISORY & SUPPLIES TECHNICAL & FINANCIAL ASSISTANCE TO UTILITY COMPANIES

1932

	EL. BOND	EL. P&L	UNITED GC.	ARK P&L	LA. P&L	MISS P&L	NAT'L P&L	MS. P&L	MPS. N.G.Co.	MS. ST. RWC.	
E. J ROESBECK	CHM. & D.	CHM. & D.	CHM & D				CHM & D				
R. INCH	P & D.	P	P. & D.				V. CHM & D			2.	
A FARRAR	V.P & D										
C. ABELL	V.P.	V. P & D	VP & D				PRES & D.	CHM & D	D.	CHM. & D	
B. SAWYER	V. P.						V. P. & D				
W. HILL	V. P							V. P		V. P.	
H. PARMHURST	V P.							V. P.			
C. RAN	TREAS	TREAS	TREAS				TREAS	ASST TREAS			
SUMMERSON	SEC	SEC & D	SEC				SEC.	ASST. SEC			
C. COUCH		D.		CHM & P.	P & D	P & D					
P. ARMSTRONG								D.			
S. BIGSWANGER									CHM. & D		
H. SIMONDS									P & D		
L. JOHNSON									V. P & D		

Exhibit B
F. U. Docket

512-a



[fol. 513] Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, F. O. Beerman, as the same appears as Exhibit "C", attached to and a part of his deposition.

Said Exhibit "C", being made a part of said deposition by witness' answer to Question 137 of said deposition, is objected to on the following grounds:

I

Because it is irrelevant and incompetent and is not the best evidence, being hearsay.

II

Because it is parol evidence of the contents of writing.

III

Because the witness does not testify of his own knowledge, but from hearsay information.

IV

Because the testimony is the conclusion, inference and opinion of the witness, based upon hearsay testimony.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

(Here follow 2 photolithographs, side folios 513a-514)

EXHIBIT C
F. O. BEERMAN

'33
'34
'35

ELECTRIC BOND & SHARE CO. 2 RECTOR ST.

CONTROLS

EBASCO SERVICE CO 100%
ORGANIZED - 1925.

CONTROLS & SUPERVISES

1933 - 58.20%
1934 - 57.92%
1935 - 57.76%

ELECTRIC POW & LIGHT CORP

ARK. P&L CO 100%

LA. P&L CO 100%

MISS P&L CO 100%

SALES CONTRACT

SALES CONTRACT

SALES CONTRACT

CONTROLLING STOCK - ALL YEARS

UNITED GAS CORP.

PURCHASE CONTRACT WITH

UNITED GAS PUB SERVICE CO 100%

EIGHT SUBSIDIARIES OWNED & CONTROLLED

PRODUCE 72%

PURCHASE 28%

CONTROLS & SUPERVISES

1933 - 46.56%
1934 - 46.56%
1935 - 46.56%

NATIONAL POW & LIGHT CORP

WEST TENN P&L CO 100%

MEMPHIS P&L CO 99.9%

MEMPHIS ST RWY CO 100%

SALES CONTRACT

MEMPHIS NATURAL GAS CO ~16.8%

MANAGEMENT CONTRACT WITH

COMMONWEALTH GAS CORP.

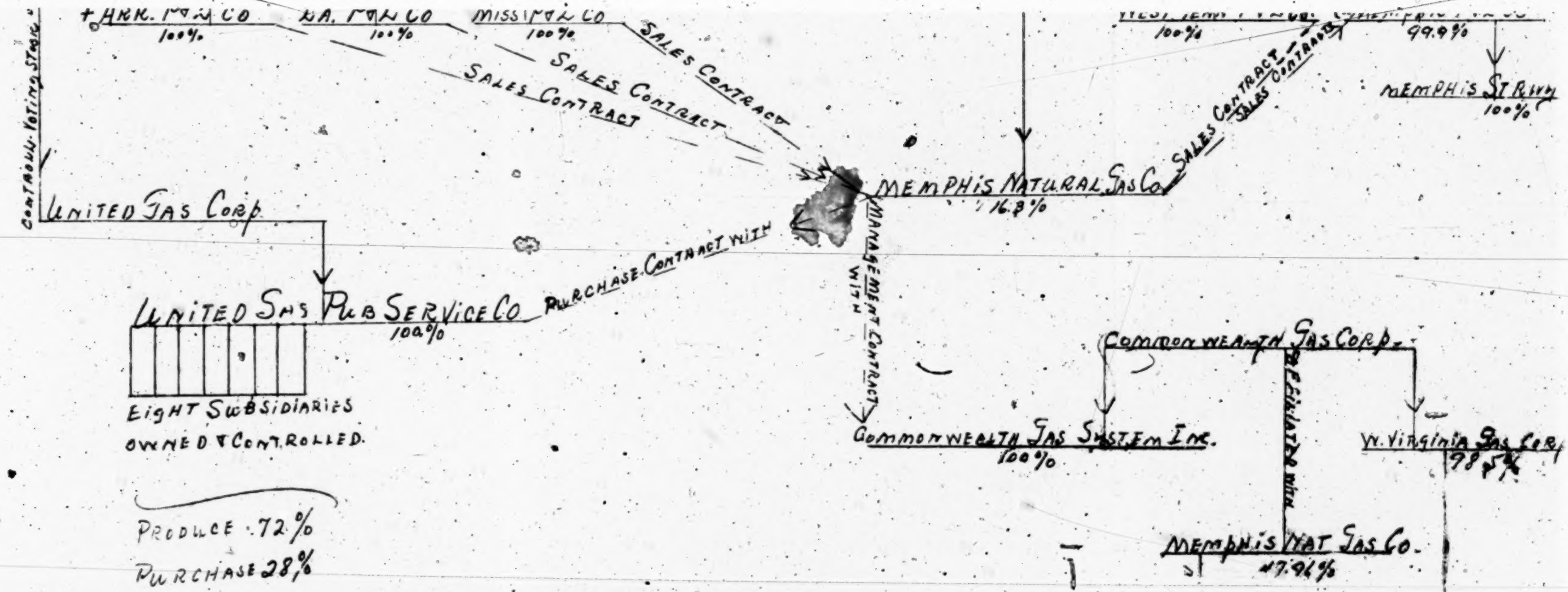
COMMONWEALTH GAS SYSTEM INC. 100%

AFFILIATED WITH

W. VIRGINIA GAS CORP. 98+%

MEMPHIS NAT. GAS CO. ~7.96%

ARK. P&L CO HELD NOTE AGAINST MEMPHIS NAT. GAS CO. $120,000 - 1932-33-34-35. SECURED BY 19.25 MILES PIPE LINE.



ARK. P&L Co HELD NOTE AGAINST MEMPHIS NAT. GAS. Co. 120,000 - 1932-33-34-35. SECURED BY 19.25 MILES PIPE LINE.

ECTRIC BOND & SHARE CO. ADVISORY CAPACITY - SUPERVISES, SUPPLIES TECHNICAL & FINANCIAL ASSISTANCE TO UTILITY COMPANIES. FEE 1.1% OF GROSS EARNINGS

GAS Co SERVICE Co ORGANIZED - 1935 FOR TECHNICAL SERVICE CONTRACTS WITH AFFILIATES OF ELECTRIC BOND & SHARE Co.

MMONWEALTH GAS CORP. ORGANIZED 7-15-1933 SUPPLANTING APPALACHIAN GAS CORP.

513-a

Exhibit C
F. O. Beerman

ERS SHOWN ON BACK.

1933

C	E. BD SH	E. PWL	U. S. C.	ARK. PWL	NAT. PWL	MFS. PWL	MFS. NAT'L	VA. VA. GAS	COM. GAS CO.	
C.E. GROSBECK	CHM & D	CHM. & D	CHM & D		CHM & D					
S.R. INCH	P & D	P & D	P & R		V. CHM & D					
A.C. RAU	TREAS	TREAS	TREAS		TREAS.	ASST. TREAS				
P.B. SAWYER	V.P.	D	D		V. P & D					
H.C. COUCH		P	D	CHM & D						
E.P. SUMMERSON		SEC & D	SEC		SEC & D	ASST. SEC				
W.P. ARMSTRONG						D	D			
M.S. BINSWANGER							D & D.			
J.J. KLISE							V.P.	P	P.	

1934

	E. BD SH	EL. PWL	U. S. C.	ARK. PWL	NAT. PWL	MFS. NAT'L	MFS. PWL	
C.E. GROSBECK	CHM & D	CHM & D	CHM & D		CHM & D			
S.R. INCH	P & D	P & D	P & D		D			
P.B. SAWYER	V.P.	D	D		V.P & D			
E.W. HILL	V.P & D							
L.H. PARKHURST	V.P & D							
E.P. SUMMERSON	SEC & D	SEC & D	SEC		D			
H.C. COUCH		D	D	CHM & P				
W.P. ARMSTRONG						D	D	
M.S. BINSWANGER						CHM & D		
W.J. O'BRIEN							M & D	

1934

	E. Bd. Sh.	El. Pwl.	U.G.C.	Ark. Pwl.	Nat. Pwl.	Mfs. Nat'l.	Mfs. Pwl.	
C.E. Grosbeck	Chm. & D.	Chm. & D.	Chm. & D.		Chm. & D.			
S.R. Inch	P. & D.	P. & D.	P. & D.		D.			
P.B. Sawyer	V.P.	D.	D.		V.P. & D.			
E.W. Hill	V.P. & D.							
L.H. Parkhurst	V.P. & D.							
E.P. Summerson	Sec. & D.	Sec. & D.	Sec.		D.			
H.C. Couch		D.	D.	Chm. & P.				
W.P. Armstrong						D.	D.	
M.S. Binswanger						Chm. & D.		
W.J. O'Brien							P. & D.	

1935

	E.Bd. & Sh.	El. Pwl.	U.G.C.	Ark. Pwl.	Nat. Pwl.	Mfs. N.J.	Mfs. Pwl.
C.E. Grosbeck	Chm. & D.						
S.R. Inch	P. & D.						
E.P. Summerson	Sec. & D.						
J.H. Gill		Chm. & P.	P. & D.				
E.W. Hill		V.P. & D.	V.P. & D.				
H.C. Couch				Chm. & P. & D.			
P.B. Sawyer					P. & D.		
E.B. Lee					V.P. & D.		
M.S. Binswanger						Chm. & D.	
R.L. Johnson						P.	
H.C. Wallace						V.P.	
W.P. Armstrong						D.	D.
W.J. O'Brien							P.

[fol. 515] EXHIBIT D. F. O. BEERMAN

State of Tennessee

Office of the Attorney General

Nashville

Roy H. Beeler, Attorney General and Reporter.

Assistant Attorney General, W. F. Barry, Jr., Nat Tipton, Edwin F. Hunt, W. H. Eagle.

Field Attorneys, Henry C. Foutch, Harry Phillips, Dudley Porter, Jr.

April 21, 1938.

Hon. W. S. Booton, Third National Bank Building, Nashville, Tennessee.

DEAR SIR:

Re: Liability of Memphis Natural Gas Company for Excise Tax

You have requested an opinion from me as to the liability of the above named company for corporation excise tax for the year 1933, and perhaps for other years, stating that if this company is liable, the amount of the tax for 1933 will be $12,493.69.

I understand the facts to be that this company brings in natural gas to the city of Memphis and other West Tennessee towns and territory from the Louisiana field in pipe lines and distributes it over West Tennessee for consumption there, and that the contention of the company is that it is engaged in interstate commerce and therefore not liable for this tax.

This contention has been rules against the company in the case of Southern Natural Gas Corporation v. Alabama, 301 U. S. 148-157, in which it was held that the imposition of a state franchise tax measured by the amount of capital employed in the state upon a foreign corporation having its commercial domicile in the state and engaged in the transmission and sale of natural gas purchased from producers outside the state is not repugnant to the commerce clause of the Constitution where the corporation engages in local activities by reducing the price of gas at point of delivery to meet needs and requirements of local

purchasers and by establishing service lines for their convenience. It was further held that such tax laid upon a foreign corporation for the privilege of doing an intrastate business may be measured by the capital employed within the state, notwithstanding the fact that a part of the property or capital included in computing the tax is used in interstate commerce.

Numerous cases are cited in the above referred to case to sustain the right of the state to impose this tax and I think there can be no question about the State's right to so impose it.

Very truly yours, (Signed) Roy H. Beeler, Attorney General.

RHB:LMY.

[fol. 516] EXHIBIT E. F. O. BEERMAN

June 16, 1938.

Hon. Walter Stokes, Com'r., Department of Finance & Taxation, Nashville, Tennessee.

DEAR SIR:

Re: Liability of Memphis Natural Gas Co. for Excise Tax

I have before me your request of June 2 for an opinion touching the captioned matter, and also have the complete file in this case, including opinions heretofore rendered by my assistants, Edwin F. Hunt and Dudley Porter, and also one under date of April 22, rendered to W. S. Booton by myself.

This case presents no serious difficulties after questions of fact have been determined, but it seems there are disagreements as to what the facts are. Even a slight variation of the facts might determine the question of liability.

It is insisted by Mr. Lewis S. Pope, the Governer's Special Investigator and attorney, and by those working for him, that the Memphis Natural Gas Company transports gas from Louisiana and southern points into the City of Memphis, or into the State of Tennessee, and there meters and sells it after the pressure is reduced to customers in Tennessee, and that by so doing the business transacted by this Company is not wholly interstate, so as to relieve it under the Federal Constitution from payment of the excise and franchise taxes to Tennessee. It is insisted by the Com-

pany that it is a transportation company solely and that it does no intrastate business in Tennessee, but that its activities are purely interstate and therefore it is protected in its operations and against the Tennessee tax by the Commerce Clause of the Federal Constitution.

Thus, it will be noted, there are disagreements of fact which I cannot undertake to determine.

The question of liability or non-liability for these taxes has been determined in several cases decided by the Supreme Court of the United States, one of the latest being Southern Natural Gas Corporation v. Alabama, 301 U. S. 148. This case was submitted on an agreed statement of facts and in passing on the case the Supreme Court used this language:

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the state from Louisiana, it appears that appellant carried on in Alabama activities of an interstate character. We had occasion in East Ohio Gas Company v. Tax Commission, 283 U. S. 465, to consider the distinction between the transportation of gas into a state and the furnishing of the gas so transported to consumers within the state. We observed in that case that 'when the gas passes from the distribution lines into the supply mains, [fol. 517] it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies,' its volume is expanded and it is divided into the smaller streams that enter the service lines connecting such mains with the pipes on the consumers' premises. In that case, the Ohio Company furnished gas to consumers in municipalities by means of distribution plants and that activity was held to be not interstate commerce but a business of purely local concern, exclusively within the jurisdiction of the state."

The Court, continuing in the Ohio case, quoted with approval the following statement of the Court taken from Missouri, Ex Rel, Barrett, v. Kansas Natural Gas Company, 265 U. S. 298:

"The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribu-

tion be made by the transporting company or by independent distributing companies. In such case the local interest is paramount and interference with interstate commerce, if any, indirect and of minor importance."

It will thus be seen that there is a twilight zone in many instances in these cases, with liability or non-liability depending upon the facts of each particular case, and I do not undertake to pass upon the facts. Neither do I know to what extent the Memphis Natural Gas Company is related to its customer companies in Tennessee by interlocking directorate, stock ownership or otherwise. I think it sufficient to observe that since this matter has been the subject of discussion from time to time and there still exists an open question as to the liability of the company and since the Governor's Special Investigator and attorney insists that there is liability, the question should be determined by the State taking steps to collect this tax. And if the Company still insists that it is not liable, the matter can be made the subject of judicial determination by proper proceedings.

However, if collection is undertaken by distress warrant and the tax is paid by the Company under protest, no compensation by way of fees should be paid to the Governor's Special Investigator and attorney until after the expiration of thirty days from the date of payment and then if suit is brought by the Company to recover the tax, no fees should be paid until the final determination of such suit, since it is not contemplated by the contract which the Governor has with his Special Investigator and attorney that any contingent fee shall be based upon a collection which may not be approved by the Court.

The conclusions herein expressed are not at variance with those heretofore expressed by my assistants or myself, since all previous conclusions have been based on the facts as they were reflected by the file at the time and the facts are not even now determined finally by the file before me.

I am sending copy of this memorandum to Hon. Walter P. Armstrong, attorney for the Company, to Governor Browning for his information, and to Lewis S. Pope, Special Investigator and attorney for the State.

Very truly yours, Roy H. Beeler, Attorney-General.

RHB*D

[fol. 518] IN CHANCERY COURT OF DAVIDSON COUNTY.

DEPOSITION OF JULIAN J. THOMAS—Filed June 6, 1939

The next witness, MR. JULIAN J. THOMAS, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Pope:

1. Q. Please state your name, age, occupation or profession?

A. Julian J. Thomas, 41 investment dealer.

2. Q. What is the name of your firm, if you have one?

A. Thomas and Shakelford.

3. Q. Where are you located?

A. 804 Third National Bank Building.

4. Q. How long have you been engaged in investment business and like business.

A. Fifteen years.

5. Q. Are you, or not, familiar with Moody's Manual, that is issued, published annually?

A. I am.

6. Q. Define, as best you can, just what Moody's Manual is?

A. Moody's Manuals are statistical information or factual information gathered by the Moody's Investors Service, relating to industrial corporations, railroads, banks, and insurance companies, municipalities, public service corporations, so far as I know.

7. Q. Are you, or not, familiar with this Manual, its purposes, and have you, or not, used it in your business [fol. 519] much or little?

A. Yes, sir, I have used the Manuals in my business for some time.

8. Q. State whether or not Moody's Manual is recognized as accurate and correct information and authority among the investment companies and investors, banks and other financial circles?

A. Moody's Investors Service, of course represented by the Manuals, is accepted as a standard statistical service.

9. Q. Informing those interested of what information?

A. Giving financial statements, showing the condition of various types of corporations.

10. Q. Does that not also contain the financial set-up, that is, the capital structure, outstanding bonds, etc.?

A. Yes, sir, it gives the financial history of the corporation of each.

11. Q. And its activities for each year?

A. The history showing the corporation, when it was formed, capital structure, and what their operations have been.

12. Q. Does it not also show the list of stockholders and officers of the company?

A. It will show the list of the officers of the Company, it does not show a list of the stockholders.

13. Q. What about Directors?

[fol. 520] A. That is included in the officers, the list of officers and Directors.

Cross-examination.

By Mr. Armstrong:

14. Q. Mr. Thomas, did Moody's Manual show McKesson-Robbins as of the year 1928?

A. Yes, sir, it does, I say this, Mr. Armstrong, purely from memory, I haven't looked up Moody's on McKesson-Robbins, so far as history is concerned.

15. Q. I will ask you to file, as Exhibit A to your deposition, excerpt from the 1938 Moody's Manual, applying to the year 1937, the last available Moody's Manual, and copy their statement as to McKesson-Robbins, will you do that, please?

A. I do not have that service.

16. Q. Don't you get Moody's Manual?

A. I don't take it now.

17. Q. Can't you get one, would you have access to one, you can have it copied at my expense, I will pay the cost of copying everything that the last Moody's Manual has to say about McKesson-Robbins,—will you do that?

A. Yes sir.

18. Q. As a matter of fact, Moody's Manual is a private [fol. 521] enterprise, it is not a public document?

A. That is correct.

19 Q. You subscribe to it, pay for it, like any other statistical service?

A. It is not a public service, you pay for it like Babson's or Forbes.

20 Q. You pay for Babson's?

A. I say it is the same thing.

21 Q. It is a private enterprise and you say it is usually regarded among investment bankers as being accurate?

A. Yes.

Re-direct examination.

By Mr. Pope:

22 Q. I will ask you whether or not this information furnished and published in Moody's is based to a great extent upon information furnished by officers of the Company itself?

A. It has always been my understanding that they accept the statements of officers and executives of a corporation, and they also have a field force which checks on that information or gets the information from the corporation, or municipality, whoever it is.

[fol. 522] Exception to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, Julian J. Thomas, being answer to Question No. 22 as same appears on pages 46 and 47 of his deposition, as follows:

"22 Q. I will ask you whether or not this information furnished and published in Moody's is based to a great extent upon information furnished by officers of the Company itself?

A. It has always been my understanding that they accept the statement of officers and executives of a corporation, and they also have a field force which checks on that information, or gets the information from the corporation, or municipality, whoever it is."

The foregoing question and answer is objected to on the ground that the answer is a conclusion and opinion of the witness, and not based on knowledge.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fols. 523-530] Re-cross-examination.

By Mr. Armstrong:

23 Q. You don't know of your own knowledge where they get the information, of your own knowledge?

A. No, sir.

Further this deponent saith not.

Julian J. Thomas, By Grace Dawson, Reporter.

Sworn to before me when given, This 21st Day of December, 1938. Grace Dawson, Notary Public. (Seal.) Tax Notary Fee $1.00.

[fol. 531] In Chancery Court of Davidson County

Deposition of J. W. Jakes—Filed June 6, 1939

J. W. Jakes, the next witness, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Pope:

1 Q. Please give your name age and profession or occupation?

A. J. W. Jakes, 57, security dealer.

2 Q. What is the name of your firm, the name of it?

A. J. W. Jakes & Company, Inc.

3 Q. Where do you do business, where located?

A. 416 Union Street, Nashville, Tennessee.

4 Q. How long have you been engaged in this business?

A. About 25 years.

5 Q. Are you familiar with the service known as Moody's Manual, with reference to financial affairs?

A. I am.

6 Q. Just in your own way tell us what it is or purports to be, etc.?

A. It is a corporation engaged in the assembling of financial facts for financial institutions throughout the country.

[fol. 532] 7 Q. It is, or not, used by those engaged in the security business as brokers and otherwise? Bankers and Investors?

A. It is used extensively by them.

8 Q. State whether or not it is accepted as authority in financial circles of this whole country?

A. It is so accepted.

9 Q. Of course you have no interest and know nothing about the lawsuit in which we are now taking this deposition?

A. I am not familiar with it.

10 Q. Don't even know what the case is?

A. No, sir.

Cross-examination.

By Mr. Armstrong:

11 Q. The truth of the business is that Moody's Manual is a publication or compilation of statistical information put out by Moody's Service and used by investment bankers and others who want that kind of information that is all there is to it?

A. That is correct.

12 Q. It is not an official publication in any sense, not published under authority of Congress, or the law of any State?

A. No, it is a private corporation.

[fol. 533] 13 Q. It is not always correct and accurate, is it, do you say is it always accurate?

A. I have never found any inaccuracies.

14 Q. Did it show Donald Coster, the President, was really Phillip Musica, a former convict?

A. No, it didn't show that.

16 Q. Did it show there was an eighteen million shortage in the drug department?

A. Of course not.

17 Q. Well, it wasn't entirely accurate in dealing with McKesson-Robbins, was it?

A. Well, Moody's does not pretend to, as I understand, make private audits, they are dependent, as I understand, upon accounts and financial statements, as furnished by the corporations.

Exceptions to Evidence

Comes the complainant and objects to, excepts to and moves to strike out the testimony of the witness, J. W. Jakes, as same appears on pages 49 and 50 of his deposition, being Question No. 17 and answer thereto, as follows:

"17 Q. Well; it wasn't entirely accurate in dealing with McKesson-Robbins, was it?

A. Well, Moody's does not pretend to, as I understand, [fol. 534] make private audits, they are dependent, as I understand, upon accountants and financial statements, as furnished by the corporations."

The foregoing question and answer is objected to on the ground that the answer is a conclusion and opinion of the witness, and not based on knowledge.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainants.

18 Q. You don't know, as a matter of fact, of your own information, actually where they get the knowledge, do you, you just know that, using it, it turns out right?

A. No, that is true.

Further this deponent saith not.

J. W. Jakes, By Grace Dawson, Reporter.

Sworn to before me when given, this 21st day of December, 1938. Grace Dawson, Notary Public. (Seal.) Tax Notary Fee $1.00.

[fol. 535] In Chancery Court of Davidson County

[Title omitted]

Stipulation—Filed October 5, 1939

It is hereby stipulated by and between attorneys for defendants Walter Stokes, Jr. former Commissioner of Finance and Taxation, the attorneys for George McCanless, present Commissioner of Finance and Taxation and the Attorney General, Honorable Roy Beeler, and the attorneys for complainant, Memphis Natural Gas Company, that, since the filing of the original bill in the above cause, said Walter Stokes, Jr. has resigned as Commissioner of Finance

and Taxation of the State of Tennessee and the Governor of the State of Tennessee has appointed George McCanless who is now the duly appointed and acting Commissioner of Finance and Taxation of the State of Tennessee.

[fol. 536] It is further stipulated that the said George McCanless adopts and continues the action of the said Stokes, his predecessor in office, in enforcing the tax statutes of the State of Tennessee referred to and complained of in the original and amended bills of complainant, which actions complainant avers are in violation of its rights.

It is further stipulated and agreed that the temporary injunction heretofore issued in this cause relating to and restraining said Stokes shall be and is considered in full force and effect and in the same manner as against said George McCanless, now Commissioner of Finance and Taxation of the State of Tennessee, and he, the said McCanless, is hereby substituted as party defendant in the place of the said Walter Stokes, Jr., as Commissioner of Finance and Taxation of the State of Tennessee, and this stipulation shall have the same force and effect as if the said George McCanless, Commissioner of Finance and Taxation had been made a party defendant by the filing of an amended and supplemental bill herein.

It is further stipulated that all proof heretofore taken shall have the same force and effect as if prior to the taking [fol. 537] of such proof the said George McCanless had been made a party defendant and had appeared and answered herein. It is further stipulated that the said McCanless adopts the answer heretofore filed on behalf of the said Stokes.

This 29th day of September, 1939.

Walter P. Armstrong, Attorney and Solicitor for Complainant Memphis Natural Gas Company. Roy H. Beeler, Attorney General, By Dudley Porter, Jr., Field Atty. Dudley Porter, Jr., Field Atty., Attorney and Solicitor for Defendant. Walter Stokes, Jr., former Commissioner of Finance and Taxation. Dudley Porter, Jr., Field Atty., Attorney nd Solicitor for George McCanless, present Co. nissioner of Finance and Taxation.

[fol. 538] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER SUBSTITUTING PARTY DEFENDANT—October 5, 1939

This cause came on this day to be heard upon the stipulation filed herein between attorneys for complainant, Memphis Natural Gas Company, Attorney General of the State of Tennessee, attorney for defendant, Walter Stokes, Jr., former Commissioner of Finance and Taxation, and attorney for George McCanless, present Commissioner of Finance & Taxation of Tennessee, and statement of counsel, from all of which it appears that since the filing of the original bill in this cause the defendant Walter Stokes, Jr., has resigned as Commissioner of Finance and Taxation and the Governor of the State of Tennessee has appointed [fol. 539] George McCanless, who is the present appointed and acting Commissioner of Finance and Taxation of the State of Tennessee; that the said George McCanless adopts and continues the action of the said Walter Stokes, Jr., his predecessor in office in enforcing the tax statutes of the State of Tennessee as referred to and complained of in the original and amended bills of complainant, which complainant avers are in violation of its rights.

It is, therefore, ordered, adjudged and decreed as set forth in said stipulation:

(1) The said George McCanless, Commissioner of Finance and Taxation of the State of Tennessee be and he is hereby substituted as and made party defendant in place of the said defendant, Walter Stokes, Jr., with the same force and effect as if the said George McCanless had been made such party defendant by the filing herein of an amended and supplemental bill.

(2) The temporary injunction and restraining order heretofore issued in this cause, served upon, relating to and restraining the said Walter Stokes, Jr., be and the same is in full force and effect in the same manner against the said George McCanless, now Commissioner of Finance and Taxation.

(3) All proof heretofore taken in this cause shall have the same force and effect as if prior to its taking the said [fol. 540] George McCanless had been made party defendant and had appeared and answered herein.

(4) The said McCanless is allowed to adopt the answer heretofore filed on behalf of the said Stokes.

OK: Walter P. Armstrong, (per T. C. McCheachern), Solicitor for complainant, Memphis Natural Gas Company. Dudley Porter, Jr., Field Atty., Solicitor for defendant, Walter Stokes, Jr., former Commissioner of Finance and Taxation. Roy H. Beeler, Attorney General. Dudley Porter, Jr., Solicitor for George McCanless, Commissioner of Finance and Taxation.

[fol. 541] COMPLAINANT'S EXHIBIT No. 1

Copy

Contract

This contract this day made and entered into by and between the State of Tennessee, acting by and through Gordon Browning, Governor of the State, hereinafter referred to as Party of the First Part, and Lewis S. Pope, an attorney of Nashville, Tennessee, hereinafter referred to as Party of the Second Part.

Witnesseth.

1. That Party of the First Part has heretofore on the 13th day of March, 1937 designated and appointed Lewis S. Pope, an attorney of Nashville, Tennessee to conduct and carry on the investigation and perform such other duties as are required of him as set out and provided in Chapter 112, Public Acts of 1937 of the State of Tennessee, and Party of the Second Part having accepted said employment and appointment, has entered upon the performance of his statutory duties. Now, by these presents, said appointment is hereby confirmed and ratified and the purpose of this contract is to define the terms of said employment and to that end, First Party agrees to pay Second Party [fol. 542] the sum of $10,000.00 as a retainer for the purpose of initiating and conducting the investigation authorized by Chapter 112, Public Acts of 1937, the remainder of the compensation, if any, to be determined by the parties hereto later.

II. Said Chapter 112, Public Acts of 1937, as well as the General Appropriation Bill of 1937 having appropriated for the purpose of making the investigation provided for by said Act the sum of $50,000.00, it is hereby agreed by

the parties hereto that said sum shall be available for expenditures for the purposes of said investigation by the Second Party in conformity with said Act and that said Second Party shall make the employment of all necessary assistants, consisting of lawyers, auditors, accountants, etc. as provided in the Act and such assistants shall be paid for their services and expenses as said Act provides, the total expenditures relating to said investigation and for the conduct of the same as such to be limited to the appropriation of $50,000.00.

It is understood by the parties hereto that nothing in this contract contained shall in any wise affect the compensation to be paid to Second Party hereto for the collection of any revenues due the State, which collections may be made by Second Party under the terms of Chapter 112, Public Acts of 1937, and compensation for all such [fol. 543] collections shall be paid on a contingent fee basis to be agreed to by the parties hereto and evidenced by their execution of a separate contract relating to collections of delinquent taxes and revenue due the state.

This contract executed in duplicate on this the 18th day of June, 1937 by and between the parties hereto, each party retaining a copy hereof.

State of Tennessee, Party of the First Part, by Gordon Browning, Governor. Lewis S. Pope, Party of the Second Part.

Approved as to form:

Roy H. Beeler, Attorney General.

Copy

[fol. 544] COMPLAINANT'S EXHIBIT No. 2

Copy

Contract

This contract made and entered into on this the 18th day of June, 1937 by and between the State of Tennessee, acting through Gordon Browning, Governor, hereinafter referred to as Party of the First Part, and Lewis S. Pope, attorney at law, of Nashville, Tennessee, hereinafter referred to as Party of the Second Part:

Witnesseth.

That by virtue of the authority conferred upon Party of the First Part by Chapter 112, Public Acts of 1937,

Party of the First Part hereby employes Party of the Second Part as special investigator and lawyer to represent the State of Tennessee to collect any and all delinquent taxes, money and revenue, except property taxes, due the State of Tennessee as provided in said Act, the compensation to be paid by the First Party to the Second Party for services in connection with all such collections to be on a contingent basis according to the schedule annexed hereto as Exhibit No. I and identified by the signatures of the parties hereto; and the Second Party hereby accepts said employment and agrees to the terms hereof as set [fol. 545] forth herein and as contained in Chapter 112, Public Acts of 1937.

Said compensation set forth in Exhibit No. I hereto includes all compensation that shall be paid by First Party to Second Party or to any assistants who may be employed by Second Party to aid him in making said collections, including any attorneys, auditors, investigators, accountants or any other persons who may be so employed by Second Party. In other words, Second Party is to pay any persons employed by him out of the compensation allowed in Exhibit No. 1 annexed hereto.

In witness whereof the parties have executed this contract in duplicate on the date first above written, each party retaining a copy hereof.

State of Tennessee, Party of the First Part, by Gordon Browning, Governor. Lewis S. Pope, Party of the Second Part.

Approved as to form:

Roy H. Beeler, Attorney General.

Copy

[fol. 546] The following is a schedule of the compensation, or fees, to be paid Lewis S. Pope on a contingent basis for services in the collection of monies due the State, as provided in Chapter 112 of the Public Acts of 1937; and, the same is made a part of a contract entered into on June 18th, 1937 by and between the State of Tennessee, acting by and through Gordon Browning, Governor of the State, and Lewis S. Pope, Attorney, of Nashville, Tennessee:

1. For the collection of taxes, penalties and inspection fees of any and all amounts of $5,000.00 and under, and down to $500.00, without suit being brought, 20% of the

amounts collected. Any and all amounts of $500.00 and under without suit, 25% of the amount collected.

Collections of taxes, penalties and inspection fees by suit being brought of any amount of $5,000.00 and under, and down to $500.00, 25% of the amounts collected. Of any and all amounts of $500.00 and under by suit being brought 35% of the amounts collected.

[fol. 547] 2. Collections of taxes, penalties and inspection fees, without suit, of any and all amounts over $5,000.00, 15% of the amounts collected for the first $50,000.00; for any and all amounts over $50,000.00, 10% of the amounts collected.

Collection of taxes, penalties and inspection fees with suit brought, for any and all amounts over $5,000.00, 25% of the amounts collected for the first $50,000.00, and 20% of the amounts collected for the second $50,000.00; and 15% of all amounts collected over $100,000.00.

3. Collections of any and all amounts, as a result of suits now pending for gasoline taxes, penalties and inspection fees 10% of the amounts collected.

4. Collections of all amounts found to be due the State from fraud and all other sources, except taxes, penalties and inspection fees, over $500.00, if collected without suit, [fol. 548] 25% of the amounts collected. If collected by suits being brought, 35% of the amounts collected. All amounts of $500.00 and under, if collected without suit, 30% of the amounts collected. All amounts of $500.00 and under, if collected by suit brought, 40% of amounts collected.

Each and All of the above amounts fixed applies to each and every individual case and transaction. The above schedule of fees have been agreed upon and are made a part of the contract, and are identified by the signatures of Gordon Browning Governor of Tennessee, and Lewis S. Pope.

Exhibit No. 1 to the attached contract between Gordon Browning, Governor of Tennessee and Lewis S. Pope, dated June 18, 1937; identified by the signatures hereto.

Gordon Browning, Governor of Tennessee.

Lewis S. Pope, Lawyer and Investigator.

Copy

[fol. 549] In Chancery Court of Davidson County

[Title omitted]

Stipulation re Defendants' Evidence—Filed November 20, 1939

Filed herewith and marked Exhibits 1 to 7 to this stipulation are the following documents:

Exhibit #1. A copy of the notification of registration filed with the Securities and Exchange Commission on April 4, 1938 by Electric Bond and Share Company, pursuant to Section 5(a) of the Public Utility Holding Company Act of 1935, under File No. 30-139, the said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

Exhibit #2. A copy of Pages 1 and 2 as contained in the annual report on Form 10-K for fiscal year ended December 31, 1938 filed with the Securities and Exchange Commission on April 28, 1939 by Electric Power & Light Corporation, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-222, the said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

[fol. 550] Exhibit #3. A copy of Pages 1 and 2, as contained in application for registration of securities filed with the Securities and Exchange Commission on April 2, 1935 by Electric Power & Light Corporation, pursuant to the provisions of the Securities Exchange Act of 1934, under File No. 1-222, said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

Exhibit #4. A copy of Pages 1 and 2, as contained in application for registration of securities filed with the Securities and Exchange Commission on April 2, 1935 by National Power & Light Company, pursuant to the provisions of the Securities Exchange Act of 1934, under File No. 1-221, said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

Exhibit #5. A copy of Pages 1 and 2, as contained in annual report on Form 10-K for fiscal year ended December 31, 1938 filed with the Securities and Exchange Commission on April 28, 1939 by United Gas Corporation, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-220, said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

Exhibit #6. A copy of the current report on Form 8-K filed with the Securities and Exchange Commission on De-
[fol. 551] cember 10, 1937 by United Gas Public Service Company, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-1230, said copy being under the seal of the Securities and Exchange Commission and certified by Francis P. Brassor, Secretary of the said Commission and official custodian of its books and records.

Exhibit #7. A true and correct copy of the bill of complaint and exhibit thereto which was filed on June 26th, 1939 by the Memphis Natural Gas Company, the complainant in this cause, against the Memphis Power & Light Company in the Chancery Court of Shelby County, Tennessee, R. D. #43690.

The said documents are offered as evidence on behalf of the defendants. In order to expedite the taking of defendants' proof and thus bring about an early determination of this cause, it is agreed and stipulated that the said documents, by being filed herewith, are properly placed in evidence, and that the complainant will make no objection as to the regularity of the manner of their introduction. The complainant reserves the right, however, to object to the said documents for competency, relevancy and materiality.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant. Dudley Porter, Jr., Field Atty., Solicitor for Defendants.

United States of America

Securities and Exchange Commission

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commis-

sion was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Notification of registration filed with this Commission April 4, 1938 by Electric Bond and Share Company, pursuant to Section 5(a) of the Public Utility Holding Company Act of 1935, under File No. 30-139.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 4th day of November, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

[fol. 552] EXHIBIT #1

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 1 to the Stipulation filed by the defendant in this cause on the following grounds:

(1) It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2) It is hearsay as to complainant, being a statement made by Electric Bond and Share Company, and without any showing as to the knowledge or authorization of complaipant or its consent thereto.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

Filed Nov. 20, 1939. J. C. Dale, Jr., C. & M.
Filed 4/10/41. David S. Lansden, Clerk.

[fol. 552a] [Stamp:] Sec. & Exc. Comm., recd. 3rd mail, Apr. 4, 1938, Docket Mail & Files.

(Adopted October 2, 1936)

Form U5A

Date of Filing: —— —, ——. File No. ——.

(The above to be left blank)

Securities and Exchange Commission

Washington, D. C.

Notification of Registration

Filed under Section 5(a) of the Public Utility Holding Company Act of 1935

Electric Bond and Share Company

(Name of Registrant)

[fol. 552b] [Stamp:] Sec. & Exc. Comm., recd. 3rd mail, Apr. 4, 1938, Docket Mail & Files

Notification of Registration

The undersigned holding company hereby notifies the Securities and Exchange Commission that it registers under and pursuant to the provisions of Section 5(a) of the Public Utility Holding Company Act of 1935 and furnishes the following information as to the registrant and subsidiary companies* thereof:

1. Exact name of registrant: Electric Bond and Share Company.

2. Address of principal executive offices: Two Rector Street, New York, N. Y.

3. Name and address of officer to whom notices and communications should be addressed: E. P. Summerson, Secretary, Electric Bond and Share Company, Two Rector Street, New York, N. Y.

4. Submit for registrant and each subsidiary thereof: (With respect to answer applicable to Column B, "Organization", all companies listed below are corporations.)

* Because and only because required so to do by the Act and the Rules and Regulations promulgated thereunder, registrant lists herein as "subsidiary companies" all companies of which it owns, directly or indirectly, 10 per centum or more of the voting securities.

Col. A Name of Company	Col. C State of Organization	Col. D Type of Business
Holding Companies:		
Electric Bond and Share Company	New York	Holding Company
American Gas and Electric Company	New York	Holding Company
American Power & Light Company	Maine	Holding Company
Pacific Power & Light Company	Maine	Electric Utility; Water & Steam Heating; Holding Company
Electric Power & Light Corporation	Maine	Holding Company
Utah Power & Light Company	Maine	Electric Utility; Steam Heating; Holding Company
National Power & Light Company	New Jersey	Holding Company
Lehigh Power Securities Corporation	Delaware	Holding Company
[fol. 552c]		
Non-Holding Company Subsidiaries, Direct and Indirect, of above Holding Companies:		
Electric Bond and Share Company:		
Ebasco Services Incorporated	New York	Service Company
Emprezas Electricas Brasileiras, S. A.	Brazil	Service Company
Phoenix Engineering Corporation	New York	Engineering & Construction
Compania Constructora del Pacifico	Chile	Construction
Two Rector Street Corporation	New York	Real Estate
American Gas and Electric Company:		
American Gas and Electric Service Corporation	New York	Service Company
Appalachian Electric Power Company	Virginia	Electric Utility
West Virginia Power Company	West Virginia	Inactive; Owns Hydro sites
Bradford Limestone Company, Inc.	Virginia	Quarry Company
Atlantic City Electric Company	New Jersey	Electric Utility
Deepwater Operating Company	New Jersey	Operates generating station
South Pennsgrove Realty Company	New Jersey	Real Estate Company
The Franklin Real Estate Company	Pennsylvania	Real Estate Company
Indiana Franklin Realty, Inc.	Indiana	Real Estate Company
Indiana General Service Company	Indiana	Electric Utility
Indiana & Michigan Electric Company	Indiana	Electric Utility
Kanawha Valley Power Company	West Virginia	Electric Utility
Kentucky and West Virginia Power Company, Incorporated	Kentucky	Electric Utility
Kingsport Utilities, Incorporated	Virginia	Electric Utility
The Ohio Power Company	Ohio	Electric Utility
The Duncan Falls Company	Ohio	Real Estate Company
Beech Bottom Power Company, Inc.	West Virginia	Operates generating station
Windsor Power House Coal Company	West Virginia	Coal mining company
Windsor Coal Company	West Virginia	Coal mining company
The Peakland Corporation	Virginia	Real Estate Company
St. Joseph Heating Company	Indiana	Steam heating company
The Scranton Electric Company	Pennsylvania	Electric Utility
Southern Ohio Public Service Company	Ohio	Electric Utility
Twin Branch Railroad Company	Indiana	Short line railroad
West Pittston-Exeter Railroad Company	Pennsylvania	Short line railroad
Wheeling Electric Company	West Virginia	Electric Utility
Coal Process Corporation	Delaware	Research—Inactive
Ohio Ferro-Alloys Corporation	Ohio	Manufacturers ferro-alloys
American Power & Light Company:		
American Power & Light Company, Inc.	New York	Inactive; Name Saving Company
Big Bend Transit Company	Washington	Inactive
Central Arizona Light and Power Company	Arizona	Electric & Gas Utility

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
American Power & Light Company (Cont.)		
Florida Power & Light Company	Florida	Electric & Gas Utility;
Consumers Water Company	Florida	Water
Miami Beach Railway Company (The)	Florida	Transportation
Miami Water Company	Florida	Water
Kansas Gas and Electric Company	West Virginia	Electric Utility
[fol. 552d]		
Minnesota Power & Light Company	Minnesota	Electric Utility
Great Northern Power Company	Minnesota	Inactive
Montana Power Company (The)	New Jersey	Electric & Gas Utility; Steam Heating; Water
Glacier Production Company	New Jersey	Natural Gas Production and Transmission
Great Falls Townsite Company	Montana	Hotel & Real Estate Ownership
Rocky Mountain Power Company	Delaware	Construction of hydro-electric development
Nebraska Power Company	Maine	Electric Utility
New Mexico Electric Service Company	New Mexico	Electric Utility
Northern Power Company	Wisconsin	Electric Utility
Northwestern Electric Company	Washington	Electric Utility
Pacific Power & Light Company:		
Inland Power & Light Company	Oregon	Electric Utility
Yakima Credit Corporation	Washington	Financing fruit marketin
Pike Rapids Power Company (The)	Minnesota	Inactive
Portland Gas & Coke Company	Oregon	Gas Utility
Gasco Finance Company	Oregon	Gas Appliance Financing
Southwestern Power & Light Company	Maine	Inactive
Superior Water, Light and Power Company	Wisconsin	Electric & Gas Utility; Water
Texas Electric Service Company	Texas	Electric Utility
Texas Power & Light Company	Texas	Electric Utility
Texas Public Utilities Corporation	Texas	Electric Utility; Ice a Water; Natural Gas Wholesale
Topeka Land Company	Minnesota	Inactive
Utilities Land Company	Florida	Real Estate Ownership
Washington Irrigation & Development Company	Washington	Inactive
Columbia Highlands Company	Washington	Inactive
Limestone Company (The)	Washington	Inactive
Washington Water Power Company (The)	Washington	Electric Utility; Water
Spokane Central Heating Company	Washington	Steam Heating
Spokane United Railways	Washington	Transportation
Electric Power & Light Corporation:		
Arkansas Power & Light Company	Arkansas	Electric & Gas Utility, Water, Ice, Transportation
Capital Transportation Company	Delaware	Transportation
White River Power Company	Arkansas	Owns hydro site
Dallas Power & Light Company	Texas	Electric Utility
Dallas Railway & Terminal Company	Texas	Transportation
Electric Power & Light Corporation	New York	(a)
Gentilly Development Company, Inc.	Louisiana	Real Estate
Idaho Power Company	Maine	Electric Utility
Louisiana Power & Light Company	Florida	Electric & Gas Utility; Water, Transportation Ice
Mississippi Power & Light Company	Florida	Electric & Gas Utility, Water, Transportation Ice

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
[fol. 552e]		
Electric Power & Light Corporation (Cont.)		
New Orleans Public Service, Inc	Louisiana	Electric & Gas Utility, Transportation
Northern Texas Company	Delaware	Properties under lease to associated companies
United Gas Corporation	Delaware	Purchase & distribution of natural gas at retail
Compania Mexicana de Gas, S. A.	Mexico	Purchase, transmission and sale at wholesale of natural gas
Credito Industrial de Monterrey, S. A.	Mexico	Commereial banking
Duval Texas Sulphur Company	Texas	Sulphur
Houston Gas & Fuel Company	Texas	(a)
Houston Gas Securities Company	Delaware	(b)
Mississippi River Fuel Corporation	Delaware	Transmission and sale of natural gas at wholesale
Union Producing Company	Delaware	Development; production; purchase, & sale at wholesale of natural gas, extraction of natural gasoline from natural gas & sale of same; production & sale of crude oil
Spring Hill Land Company Inc.	Louisiana	Real Estate
United Gas Pipe Line Company	Delaware	Transmission of natural gas and operates gasoline extraction plants
Houston Gulf Gas Company	Delaware	Development; production, purchase, sale at wholesale & transmission of natural gas; production, sale & transmission of crude oil
United Oil Pipe Line Company	Delaware	Transmission of crude oil
United Gas Corporation	New York	(a)
The Palmer Corporation of Louisiana	Delaware	(a)
United Gas Public Service Co, Inc.	Alabama	(a)
United Gas Public Service Co.	Arkansas	(a)
United Gas Public Service Co.	Florida	(a)
United Gas Public Service Co.	Georgia	(a)
United Gas Public Service Co.	Louisiana	(a)
United Gas Public Service Co.	Mississippi	(a)
United Gas Public Service Co.	Texas	(a)
United Gas System, Inc.	Alabama	(a)
United Gas System, Inc.	Louisiana	(a)
United Gas System, Inc.	Mississippi	(a)
United Gas System, Inc.	Texas	(a)
Utah Power & Light Company:		
Bountiful Light and Power Company	Utah	Electric Utility
Utah Light and Traction Company	Utah	Transportation; facilities for generation, transmission and distribution of electric energy are under lease to Utah Power & Light Company
Western Colorado Power Company (The)	Colorado	Electric Utility

(a) Subsidiaries for the purpose of preserving corporate name.
(b) Inactive company owning securities against which its securities have been issued.

[fol. 552f]

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
National Power & Light Company:		
Birmingham Electric Company	Alabama	Electric Utility, Transportation, Steam Heat
Carolina Power & Light Company	No. Carolina	Electric Utility, Transportation
Capitan Corporation	Tennessee	Real Estate
Holston River Electric Company	Tennessee	Electric Utility
Houston Lighting & Power Company	Texas	Electric Utility
Memphis Natural Gas Company	Delaware	Transmission and sale of natural gas at wholesale
Memphis Power & Light Company	New Jersey	Electric & Gas Utility
Memphis Street Railway Company, The	Tennessee	Transportation (a)
National Power & Light Company Inc.	New York	(b)
Roanoke River Power Company	Virginia	Owns development site & operates transmission line
South Texas Utilities Company	Texas	Water, Ice
Tennessee Public Service Company	Maine	Electric Utility, Transportation
West Tennessee Power & Light Company	Tennessee	Electric & Gas Utility, Transportation, Water, Ice
Lehigh Power Securities Corporation:		
Edison Illuminating Company of Easton, The	Pennsylvania	Owns & Leases Electric Property
Easton Transit Company	Pennsylvania	Owns & Leases Transportation Property
Easton and South Bethlehem Transportation Company	Pennsylvania	Transportation
Freemansburg Land Company	Pennsylvania	Real Estate
Pennsylvania Motor Company, The	Pennsylvania	Owns & Leases Transportation Property
Lehigh Power Securities Corporation	New York	(b)
Lehigh Valley Transit Company	Pennsylvania	Transportation
Allentown Bridge Company	Pennsylvania	Toll Bridge
Central Park Amusement Company	Pennsylvania	Amusement Park
Lehigh Valley Realty Company	Pennsylvania	Real Estate
Lehigh Valley Stone & Construction Company	Pennsylvania	Stone crushing
Lehigh Valley Transportation Company	Pennsylvania	Transportation
Norristown Transit Company	Pennsylvania	Owns & Leases Transportation Property
Mauch Chunk Heat, Power and Electric Light Company	Pennsylvania	Heat & Electric Utility
Pennsylvania Power & Light Company	Pennsylvania	Electric & Gas Utility
Hazle Township Water Company	Pennsylvania	Water
Hummelstown Water Supply Company	Pennsylvania	Water
North Branch Development Company	Pennsylvania	Natural gas production
Pennsylvania Realty & Investment Company	Pennsylvania	Real Estate & Investments
East Penn Transportation Company	Pennsylvania	Transportation
West Pittston & Exeter Railway Company	Pennsylvania	Short line railroad

[fol. 552g]

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
National Power & Light Company (Cont.)		
Lehigh Power Securities Corporation (Cont.)		
Pennsylvania Power & Light Company (Cont.)		
Susquehanna Gas Company	Pennsylvania	Natural gas pipe line
Valley Railways	Pennsylvania	Transportation
Valley Transportation Company	Pennsylvania	Transportation
Wrightsville Water Supply Company	Pennsylvania	Water

(a) Although Memphis Power & Light Company owns voting trust certificates for 100% of the Common Stock and voting certificates for approximately 30.66% of the Preferred Stock of The Memphis Street Railway Company and National Power & Light Company owns voting trust certificates for approximately 4.2% of the Preferred Stock of The Memphis Street Railway Company, the voting control is vested in non-affiliated interests.
(b) Subsidiaries for the purpose of preserving corporate name.

American & Foreign Power Company Inc. Has Made Application for Itself and Each of Its Subsidiaries Under Sections 3(a)5 and 3(b) of the Act for Exemption from the Provisions of The Act, Both as a Holding Company and as a Subsidiary, and the Act Therefore Is Not Presently Applicable to Any of These Companies. American & Foreign Power Company Inc. and Its Subsidiaries Are, However, Listed Below.

Col. A Name of Company	Col. C State of Organization	Col. D Type of Business
American & Foreign Power Company, Inc.	Maine	Holding Company
South American Power Company	Florida	Holding Company
Argentine Electric Companies	Florida	Holding Company
Compania de Electricidad del Este Argentino, S. A.	Argentina	Electric Utility; Transportation, Ice
Compania de Electricidad de Los Andes, S. A.	Argentina	Electric Utility, Transportation
Compania Central Argentina de Electricidad, S. A.	Argentina	Electric Utility, Transportation, Ice
Electricidad de Alta Gracia	Argentina	Electric Utility
Compania de Electricidad del Norte Argentino, S. A.	Argentina	Electric Utility, Ice
Compania Hidro-Electrica de Tucuman	Argentina	Electric Utility
Compania de Electricidad del Sud Argentino, S. A.	Argentina	Electric Utility, Ice
Tranvias Electrica de Tucuman, S. A.	Argentina	Transportation
Operating Subsidiary Company	Argentina	Electric Utility
Operating Subsidiary Company	England	Transportation
Operating Subsidiary Company	Maine	Electric Utility

[fol. 552h]

Brazilian Electric Power Company	Florida	Holding Company
The Southern Brazil Electric Company, Limited	England	Electric Utility, Transportation
Companhia Mogyana de Luz e Forca	Brazil	Electric Utility
Empreza Electrica de Amparo	Brazil	Electric Utility
Empreza de Melhoramentos Urbanos	Brazil	Water
Companhia Campineira de Traccao, Luz e Forca	Brazil	Electric Utility, Transportation
Empreza de Melhoramentos Urbanos de Paranagua	Brazil	Electric Utility, Water
Companhia Electricidade Taquaritinga	Brazil	Electric Utility
Empreza "Orion" de Barretos	Brazil	Electric Utility

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
American & Foreign Power Company, Inc. (Cont.)		
South American Power Company (Cont.)		
Brazilian Electric Power Company (Cont.)		
Companhia Forca e Luz de Jaboticabal	Brazil	Electric Utility
Empreza de Electricidade de Rio Preto	Brazil	Electric Utility
Companhia Central Electrica de Icem	Brazil	Electric Utility
Empreza Forca e Luz de Ribeirao Preto	Brazil	Electric Utility, Water
Companhia Francana de Electricidade	Brazil	Electric Utility
Companhia melhoramentos de Batataes	Brazil	Electric Utility, Water
Companhia Douradease de Electricidade	Brazil	Electric Utility
Empreza Forca e Luz do Jahu	Brazil	Electric Utility
Empreza de Electricidade de Araraquara	Brazil	Electric Utility
Companhia Forca e Luz Carioba	Brazil	Electric Utility
Companhia Paulista de Forca e Luz	Brazil	Electric Utility
Companhia Forca e Luz de Brotas	Brazil	Electric Utility
Empreza Electrica de Bebedouro	Brazil	Electric Utility
Companhia Traccao, Luz e Forca de Florianopolis	Brazil	Electric Utility
Empreza Caracolense de Luz, Forca e Telephone	Brazil	Electric Utility
Companhia Linha Circular de Carris da Bahia	Brazil	Transportation
Companhia Energia Electrica da Bahia	Brazil	Electric, Telephone
Companhia Energia Electrica Rio Grandense	Brazil	Electric & Gas Utility
Companhia Carris Porto Alegrense	Brazil	Transportation
The Rio Grandense Light and Power Syndicate, Limited	England	Electric Utility, Transportation
Companhia Forca e Luz do Parana	Brazil	Electric Utility, Transportation
Pernambuco Tramways and Power Company, Limited	England	Electric & Gas Utility, Transportation
Telephone Company of Pernambuco, Limited	England	Telephone
[fol. 552i]		
Companhia Forca e Luz sul Rio Grandense	Brazil	Non Operating
Companhia Brasileira de Energia Electrica	Brazil	Electric Utility, Transportation
Companhia Forca e Luz de Minas Geraes	Brazil	Electric Utility, Transportation
Companhia Central Brasileira de Forca Electrica	Brazil	Electric Utility, Telephone, Transportation
Companhia Forca e Luz Nordeste do Brazil	Brazil	Electric Utility, Transportation, Telephone
Companhia de Terras e Lavoura	Brazil	Non Operating
Companhia Minas Recreio	Brazil	
Chilean Electric Power Company	Nevada	Holding Company
Compania Chilena de Electricidad Limitada	Chile	Electric Utility
Compania de Traccion de Santiago	Chile	Transportation
Empresa Electrica de San Antonio	Chile	Electric Utility

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
American & Foreign Power Company, Inc. (Cont.)		
Chilean Electric Power Company (Cont.)		
Compania Chilena de Electricidad Limitada (Cont.)		
Ferrocarril Electrico de Santiago a San Bernardo	Chile	Transportation
Compania de Electricidad de Valparaiso	Chile	Electric Utility, Transportation
Empreza Electrica de Los Andes	Chile	Electric Utility
Compania Hidro-Electric Volcan	Chile	Electric Utility
Compania Hidro-Electrica	Chile	Electric Utility
Sociedad Carbonifera de Mafil	Chile	Electric Utility
Far East Power Corporation	Delaware	Holding Company
Shanghai Power Company	Delaware	Electric Utility
Western District Power Company of Shanghai	U. S. A.	Electric Utility
Colombian Electric Company	Florida	Electric Utility, Ice
Empreza d Energia Electrica de Honda	Colombia	Electric Utility
Compania de Hielo de Santa Marta	Colombia	Electric Utility
Costa Rican Electric Company	Florida	Holding Company
The Costa Rica Electric Light and Traction Company, Limited	England	Electric Utility, Transportation
Compania Nacional Hidroelectrica, S. A.	Costa Rica	Electric Utility
Compania Nacional de Electricidad	Costa Rica	Electric Utility, Telephone
Havana Electric & Utilities Company	Maine	Holding Company
Cuban Electric Company	Florida	Electric & Gas Utility, Ice, Water
Havana & Insular Real Estate Company	Maine	Real Estate
Empreza Electrica del Ecuador, Inc	Maine	Electric Utility
Empreza Guatemalteca de Electricidad, Inc.	Delaware	Electric Utility
[fol. 552j]		
Public Utilities Investment Trust, Limited	England	Holding Company
Tata Hydro-Electric Agencies, Limited	India	Managing Agency Company
The Consolidated Investment Trust, Limited	India	Holding Company
The United Eastern Agencies, Limited	India	Managing Agency Company
The Nasik-Deolali Electric Supply Company, Limited	India	Electric Utility, Ice
The Poona Electric Supply Company, Limited	India	Electric Utility
Broach Electric Supply and Development Corporation, Limited	India	Electric Utility
The Karachi Electric Supply Corporation, Limited	India	Electric Utility
Mexican Electric Companies, Inc	Delaware	Holding Company
Mexican Utilities Company	Maine	Holding Company
Compania Hidro-Electrica Queretana, S. A.	Mexico	Electric Utility
The Guanajuato Power and Electric Company	Colorado	Electric Utility
The Michoacan Power Company	Colorado	Electric Utility
Compania Hidroelectrica Guanajuatense, S. A.	Mexico	Electric Utility
Compania Nacional de Electricidad, S. A.	Mexico	Electric Utility

Col. A (Cont.) Name of Company	Col. C (Cont.) State of Organization	Col. D (Cont.) Type of Business
American & Foreign Power Company, Inc. (Cont.)		
Mexican Electric Companies, Inc. (Cont.)		
Compania Impulsora de Empresas Electricas, S. A.	Mexico	Service Company
Central Mexico Light and Power Company	Maine	Electric Utility
Compania Electrica de Tampico, S. A.	Mexico	Electric Utility, Transportation
Abastecedora Luz, Fuerza, Agua, S. A.	Mexico	Electric Utility, Water
Ferrocarril de Torreon, S. A.	Mexico	Real Estate
The Northern Mexico Power and Development Company, Limited	Ontario	Holding Company
Compania Agricola y de Fuerza Electrica del Rio Conchos, S. A.	Mexico	Electric Utility
Compania Hidroelectrica Potosina, S. A.	Mexico	Electric Utility
The Vera Cruz Electric Light, Power and Traction, Limited	England	Electric Utility
Compania de Electricidad de Merida, S. A.	Mexico	Electric Utility
Puebla Tramway, Light and Power Company	Canada	Electric Utility
Compania Hidro-Electrica de Puebla, S. A.	Mexico	Inactive
Compania Electrica de Cordoba, S. A.	Mexico	Electric Utility
Compania Electrica Mexicana, S. A.	Mexico	Electric Utility
Compania de Luz Electrica y Fuerza Motriz de Orizaba, S. A.	Mexico	Electric Utility
Panama Power & Light Company	Florida	Electric & Gas Utility, Ice, Telephone
Panama Electric Company	New Jersey	Electric Utility, Transportation
Venezuela Electric Company	Delaware	Electric Utility, Ice

[fol. 552k] Pursuant to the requirements of the Public Utility Holding Company Act of 1935, the registrant has caused this notification of registration to be duly signed on its behalf in the City of New York and State of New York on the 4th day of April, 1938.

This notification of registration is filed in full reliance on Rule 4, as amended, of General Rules and Regulations of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Neither this notification nor the acceptance of or reliance upon any order, rule or regulation, nor the compliance with any provision of said Act, of the rules and regulations, or of any order or direction of the Securities and Exchange Commission shall be deemed a waiver of any constitutional or legal right of Electric Bond and Share Company or of any of its subsidiary companies, all of which are hereby expressly reserved. If this reservation and refusal to waive any constitutional or legal rights shall be held invalid or inoperative by any

court of competent jurisdiction, this notification of registration shall be deemed to have been void and of no effect from any date specified in written notice given to the Securities and Exchange Commission by or on behalf of Electric Bond and Share Company.

(Name of Registrant): Electric Bond and Share Company, by S. W. Murphy, Vice-President.

Attest: E. ——, Secretary.

Verification

STATE OF NEW YORK,
County of New York, ss.:

The undersigned being duly sworn deposes and says that he has duly executed the attached notification of registration dated April 4, 1938 for and on behalf of Electric Bond and Share Company; that he is the Vice-President of such company; and that all action by stockholders, directors and other bodies necessary to authorize deponent to execute and file such instrument has been taken. Deponent further says that he is familiar with such instrument and the contents thereof, and that the facts therein set forth are true to the best of his knowledge, information and belief.

S. W. Murphy.

[Stamp:] Sec. & Exc. Comm. Recd. 3rd Mail Apr. 4, 1940. Docket Mail & Files.

Subscribed and sworn to before me, a Notary Public, this 4th day of April, 1938. Phyllis Hoffman. Term Expires March 30, 1939.

[fol. 553] EXHIBIT No. 2

United States of America

Securities and Exchange Commission

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and

records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Pages 1 and 2, as contained in annual report on Form 10-K for fiscal year ended December 31, 1938 filed with this Commission April 28, 1939 by Electric Power & Light Corporation, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-222.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 17th day of October, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 2 to the Stipulation filed by the defendant in this cause on the following grounds:

(1). It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2). It is hearsay as to complainant, being a statement made by Electric Power and Light Company, and without any showing as to the knowledge or authorization of complainant or its consent thereto.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 553a] *The information required to be given under the items herein set forth is more specifically defined in the "Instruction Book for Form 10-K for Corporations".*

The Instruction Book also sets forth requirements as to exhibits which are to accompany the annual report.

Affiliations

1. List the following and indicate the respective percentages of voting power, or other basis of control, as required by the Instructions:

(a) All subsidiaries of the registrant.

	Percentage Percentage
Arkansas Power & Light Company	90.22
Capital Transportation Company	100.
White River Power Company	100.
Dallas Power & Light Company	70.
Dallas Railway & Terminal Company	88.05
*Electric Power & Light Corporation (New York)	100.
Gentilly Development Company, Inc	100.
Idaho Power Company	71.76
Louisiana Power & Light Company	95.43
Mississippi Power & Light Company	94.03
New Orleans Public Service Inc	95.14
Northern Texas Company	100.
Utah Power & Light Company	92.39
Utah Light and Traction Company	99.98
Western Colorado Power Company (The)	99.97
United Gas Corporation	61.58
Compania Mexicana de Gas, S. A	100.
Duval Texas Sulphur Company	74.71
Houston Gas & Fuel Company	100.
Houston Gas Securities Company	100.
Union Producing Company	100.
Springhill Land Company, Incorporated	50.67(A)
United Gas Pipe Line Company	100.
Houston Gulf Gas Company	99.59
United Oil Pipe Line Company	100.
* United Gas Public Service Co. Inc., (Alabama)	100.
* United Gas Public Service Co. (Arkansas)	100.
* United Gas Public Service Co. (Florida)	100.
* United Gas Public Service Co. (Georgia)	100.
* United Gas Public Service Co. Inc. ,(Louisiana)	100.
* United Gas Public Service Co. (Mississippi)	100.
* United Gas Public Service Co. (Texas)	100.
* United Gas System, Inc. (Alabama)	100.
* United Gas System, Inc. (Louisiana)	100.
* United Gas System, Inc. (Mississippi)	100.
* United Gas System, Inc. (Texas)	100.
* United Gas Corporation (New York)	100.

*Subsidiaries for purpose of preserving corporate name.

(A) With the exception of this company, all of the foregoing companies are included in the consolidated financial statements of registrant. The investment in Springhill Land Company, Incorporated, represents less than 1/10 of 1% of the total assets of its parent, Union Producing Company, and is insignificant with respect to registrant and its subsidiaries consolidated.

[fol. 553b] In addition to the foregoing, United Gas Corporation owns approximately 47% of the capital stock and certain indebtedness of Mississippi River Fuel Corporation, which corporation has filed an application (File No. 31-429) with the Securities and Exchange Commission, pursuant to Section 2 (a) (8) of the Public Utility Holding Company Act of 1935, for an order declaring that it is not a subsidiary of United Gas Corporation, registrant, or Electric Bond and Share Company, as well as certain other investments of minor importance.

(b) All parents of the registrant.

	Percentage
Electric Bond and Share Company, a New York Corporation Electric Power & Light Corporation, the registrant	47.05 (A)*

(A) Based upon information furnished registrant by Electric Bond and Share Company.

* Based on total amount of Common, $7 Preferred, and $6 Preferred outstanding (less 973 shares $7 Preferred and 902 shares Common Stock reacquired) all such outstanding stock being entitled to vote.

Management and Control

2. List the names and addresses of all directors and officers of the registrant. Indicate the office or offices held. If any person is both an officer and director, so state.

Name	Address	Office
Edgar H. Dixon	2 Rector Street, New York, N. Y.	Director Secretary-Treasurer
Joe H. Gill	Glenville Road, Greenwich, Conn.	Director Chairman of Board President
F. T. Hepburn	63 Wall Street, New York, N. Y.	Director
Ernest W. Hill	2 Rector Street, New York, N. Y.	Director Vice President
Arthur F. Hoffman	2 Rector Street, New York, N. Y.	Director Assistant Secretary Assistant Treasurer
H. L. Hollis	80 E. Jackson Blvd., Chicago, Ill.	Director
Hunter S. Marston	Watch Hill, R. I.	Director
Harold F. Sanders	2 Rector Street, New York, N. Y.	Director Assistant Secretary Assistant Treasurer
E. B. Tracy	1 Wall Street, New York, N. Y.	Director

[fol. 554] EXHIBIT #3

United States of America

Securities and Exchange Commission

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade

Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Pages 1 and 2, as contained in application for registration of securities filed with this Commission April 2, 1935 by Electric Power & Light Corporation, pursuant to the provisions of the Securities Exchange Act of 1934, under File No. 1-222.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 17th day of October, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

Filed 11/20/39. J. C. Dale, Jr., C. & M.

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 3 to the Stipulation filed by the defendant in this cause on the following grounds:

(1) It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2) It is hearsay as to complainant, being a statement made by Electric Power and Light Company, and without any showing as to the knowledge or authorization of complainant or its consent thereto.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 554a] Organization

1. Exact name of registrant: Electric Power & Light Corporation.
2. Address of principal executive offices: Two Rector Street, New York, N. Y.
3. The state or other sovereign power under which incorporated: Maine.
4. Date of incorporation: March 11, 1925.
5. Date of termination of charter: Not limited.
6. Date upon which fiscal year ends: December 31.

7. Date and place of annual meetings: First Wednesday in November at the corporation's office at Augusta, Maine.

8. Name all securities exchanges upon which each class of securities of the registrant is temporarily registered.

New York Stock Exchange: $7 Preferred, cumulative; no par value. $6 Preferred, cumulative; no par value. Common Stock; no par value.

9. Name all securities exchanges upon which each class of securities registered hereunder is to be registered:

New York Stock Exchange: $7 Preferred, cumulative; no par value. $6 Preferred, cumulative; no par value. Common Stock; no par value.

10. List the following and indicate the respective percentages of voting power as required by the instructions:

(*a*) All subsidiaries of the registrant.

	Percentage
Arkansas Power & Light Company	88.22
Dallas Power & Light Company	69.98
Dallas Railway & Terminal Company	88.04
†Garland Power & Development Co. of Arkansas (The)	100.
†White River Power Company	100.
†Gentilly Development Company, Inc.	99.98
Inter-City Terminal Railway Company	99.85
Louisiana Power & Light Company	95.43
Pelican Power Company	100.
Louisiana Rapid Transit Company	100.
Mississippi Power & Light Company	94.03
[fol. 554b] †Mt. Olive Electric & Water Company	100.
New Orleans Public Service Inc.	95.08
Jefferson Bus Lines, Inc.	100.
†Jefferson and Lake Pontchartrain Railway Company	100.
†Railways Realty Company	100.
Northern Texas Company	100.
Power Securities Corporation	100.
Idaho Power Company	71.75
Nevada Power Company	99.83
Salmon River Power & Light Company	99.
Utah Power & Light Company	92.38
Bountiful Light and Power Company	98.29
Utah Light and Traction Company	99.98
Western Colorado Power Company (The)	99.97
United Gas Corporation	61.58

	Percentage
Duval Texas Sulphur Company	74.71
A San Diego & Gulf Railway Company	50.
Houston Gas Securities Company	100.
A San Diego & Gulf Railway Company	50.
United Gas Public Service Company	100.
Compania Mexicana de Gas, S. A.	100.
De Siard Development Company Inc. (The)	100.
Houston Gulf Gas Company	99.48
Houston Gas and Fuel Company (R. B. Creager, Receiver)	99.31
Motor Fuel Products Company	100.
Northern Texas Utilities Company	98.14
Southern Gas Utilities, Inc.	99.99
Southern Gas & Fuel Company	100.
United Production Corporation	100.

† Inactive companies.
A—Control is held jointly.

The foregoing list does not include "name-saving" companies, or subsidiaries now in process of dissolution or other "shell" subsidiaries the corporate existence of which has been continued because of franchise problems, pending litigation, etc. None of the companies omitted has any substantial assets and none has any liabilities which have not been assumed either formally or in effect by a parent company or which are not reflected in the consolidated financial statements of the registrant.

(*b*) All parents of the registrant.

Electric Bond and Share Company	
Electric Power & Light Corporation	47.24%

History and Business

11. Describe briefly the general character of the business done by the registrant and its subsidiaries, and any substantial changes which may have occurred in the general character of the business within the preceding five years:

Electric Power & Light Corporation is a holding company which owns substantially all the common stocks (and in some cases varying amounts of preferred and second pre-

ferred stocks as well as certain indebtedness) of the following companies, as well as of some less important companies:

Arkansas Power & Light Company, supplying electric power and light service in 229 communities in Arkansas, including Little Rock, Pine Bluff, Hot Springs (at wholesale), and North Little Rock (at wholesale); natural gas service in 18 communities; transportation service in Little Rock and Pine Bluff; water service in 23 communities; and operating ice plants in 21 communities. The population of the territory served is estimated at 425,000.

[fol. 555] EXHIBIT #4

United States of America

Securities and Exchange Commission

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Pages 1 and 2, as contained in application for registration of securities filed with this Commission April 2, 1935 by National Power & Light Company, pursuant to the provisions of the Securities Exchange Act of 1934, under File No. 1-221.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 17th day of October, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

Filed 11/20/39. J. C. Dale, Jr., C. & M.

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 4 to the

Stipulation filed by the defendant in this cause on the following grounds:

(1) It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2) It is hearsay as to complainant, being a statement made by National Power and Light Company, and without any showing as to the knowledge or authorization of complainant or its consent thereto.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 555a] Organization

1. Exact name of registrant: National Power & Light Company.

2. Address of principal executive offices: Two Rector Street, New York, New York.

3. The state or other sovereign power under which incorporated: New Jersey.

4. Date of incorporation: December 7, 1925.

5. Date of termination of charter: Perpetual.

6. Date upon which fiscal year ends: December 31.

7. Date and place of annual meetings: Second Wednesday in November at the office of the Corporation at Jersey City, N. J.

8. Name all securities exchanges upon which each class of securities of the registrant is temporarily registered. New York Stock Exchange: Common Stock; no par value. Philadelphia Stock Exchange: Common Stock; no par value.

9. Name all securities exchanges upon which each class of securities registered hereunder is to be registered: New York Stock Exchange: Common Stock; no par value. Philadelphia Stock Exchange: Common Stock; no par value.

10. List the following and indicate the respective percentages of voting power as required by the instructions:

(a) All subsidiaries of the registrant.

	Percentage
Birmingham Electric Company	100.
Carolina Power & Light Company	93.53
Capitan Corporation	100.
Holston River Electric Company	100.
Houston Lighting & Power Company	91.32

	Percentage
Memphis Power & Light Company	86.80
C* Memphis Street Railway Company, The	
Roanoke River Power Company	100.
South Texas Utilities Company	99.97
Tennessee Public Service Company	99.31
West Tennessee Power & Light Company	99.99
Lehigh Power Securities Corporation	99.65
[fol. 555b] Lehigh Valley Transit Company	98.17
Allentown Bridge Company	100.
Central Park Amusement Company	100.
Easton Consolidated Electric Company	99.96
Easton Transit Company	100.
Easton and South Bethlehem Transportation Company	100.
Freemansburg Land Company	57.14
Edison Illuminating Company of Easton (The)	100.
Pennsylvania Motor Company, The	100.
Lehigh Valley Realty Company	100.
Lehigh Valley Stone & Construction Company	100.
Lehigh Valley Transportation Company	100.
A* Norristown Transit Company	50.
Pennsylvania Power & Light Company	75.63
Carlisle Gas and Water Company, The	100.
Columbia Gas Company, The	99.79
†Conestoga Terminal Company	100.
Hazle Township Water Company	100.
Hummelstown Water Supply Company	100.
†Juniata River Water Power Company	100.
Lehighton Electric Light and Power Company	100.
†Milnesville Water Company, The	100.
North Branch Development Company	100.
Pennsylvania Realty & Investment Company	100.
East Penn Transportation Company	100.
B* West Pittston & Exeter Railway Company	50.

* Not consolidated with National Power & Light Company at December 31, 1934.

† Inactive companies.

	Percentage
Pine Grove Electric Light, Heat & Power Co.	100.
Shenandoah Light, Heat and Power Company, The	100.
B Stanton Operating Company	50.
*Susquehanna Boom Company	49.99
Susquehanna Gas Company	100.
†Watts Water and Power Company	100.
Valley Railways	100.
Valley Transportation Company	100.
Wrightsville Water Supply Company	100.

* Not consolidated with National Power & Light Company at December 31, 1934.

† Inactive companies,

A Balance of 50% owned by Philadelphia & Western Railway Company.

B Balance of 50% owned by Scranton Electric Company.

C The Memphis Street Railway Company was in receivership on December 31, 1934. All of that Company's Common and Preferred Stock was formerly owned by Memphis Power & Light Company, but was transferred (with certain claims and other securities) to a reorganization committee in November, 1934. In exchange for the stock, claims and securities so transferred, Memphis Power & Light Company will receive voting trust certificates for approximately 92% of the common stock and voting trust certificates for approximately 28% of the preferred stock of the Railway Company.

The foregoing list does not include "name-saving" companies, or subsidiaries now in process of dissolution or other "shell" subsidiaries the corporate existence of which has been continued because of franchise problems, pending litigation, etc. None of the companies omitted has any substantial assets and none has any liabilities which have not been assumed either formally or in effect by a parent company or which are not reflected in the consolidated financial statements of the registrant.

(b) All parents of the registrant,

Electric Bond and Share Company	
National Power & Light Company	46.56

[fol. 556] EXHIBIT #5

United States of America

Securities and Exchange Commission

I, Francis P. Brasser, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Pages 1 and 2, as contained in annual report on Form 10-K for fiscal year ended December 31, 1938 filed with this Commission April 28, 1939 by United Gas Corporation, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-220.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 17th day of October, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

Filed 11/20/39. J. C. Dale, Jr., C. & M.

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 5 to the Stipulation filed by the defendant in this cause on the following grounds:

(1). It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2). It is hearsay as to complainant, being a statement made by United Gas Corporation, and without any showing as to the knowledge or authorization of complainant or its consent thereto.

W. P. Armstrong, F. A. McEachern, Jr., Solicitors for Complainant.

[fol. 556a] *The information required to be given under the items herein set forth is more specifically defined in the "Instruction Book for Form 10-K for Corporations".*

The Instruction Book also sets forth requirements as to exhibits which are to accompany the annual report.

Affiliations

1. List the following and indicate the respective percentages of voting power, or other basis of control, as required by the Instructions:

(a) All subsidiaries of the registrant.

	Percentage
Compania Mexicana de Gas, S. A.	100.
Duval Texas Sulphur Company	74.71
*Houston Gas & Fuel Company	100.
Houston Gas Securities Company	100.
Union Producing Company	100.
Springhill Land Company, Incorporated	50.67(A)
United Gas Pipe Line Company	100.
Houston Gulf Gas Company	99.59
United Oil Pipe Line Company	100.
*United Gas Public Service Co. Inc. (Alabama)	100.
*United Gas Public Service Co. (Arkansas)	100.
*United Gas Public Service Co. (Florida)	100.
*United Gas Public Service Co. (Georgia)	100.
*United Gas Public Service Co. Inc. (Louisiana)	100.
*United Gas Public Service Co. (Mississippi)	100.
*United Gas Public Service Co. (Texas)	100.
*United Gas System, Inc. (Alabama)	100.
*United Gas System, Inc. (Louisiana)	100.
*United Gas System, Inc. (Mississippi)	100.
*United Gas System, Inc. (Texas)	100.
*United Gas Corporation (New York)	100.

(A) With the exception of this company, all of the foregoing companies are included in the consolidated financial statements of registrant. The Investment in Springhill Land Company, Incorporated represents less than 1/10 of 1% of the total assets of its parent, Union Producing Company and is insignificant with respect to registrant and its subsidiaries consolidated.

* Subsidiaries for purpose of preserving corporate name.

In addition to the foregoing, United Gas Corporation owns approximately 47% of the capital stock and certain indebtedness of Mississippi River Fuel Corporation, which corporation has filed an application (File No. 31-429) with the Securities and Exchange Commission, pursuant to Section 2(a)(8) of the Public Utility Holding Company Act of 1935, for an order declaring that it is not a subsidiary of registrant, Electric Power & Light Corporation, or Electric Bond and Share Company, as well as certain other investments of minor importance.

[fol. 556b] (*b*) *All parents of the registrant.*

	Percentage
Electric Bond and Share Company (New York)	
Electric Power & Light Corporation (Maine)	47.05 (A)
United Gas Corporation (Registrant)	61.58 (B) (C)

A—Based upon information furnished registrant by Electric Bond and Share Company.

B—Does not include 7.19% of the voting stock of United Gas Corporation held by Electric Bond and Share Company, which figure is based upon information furnished by Electric Bond and Share Company.

C—Based on total amount of Common Stock and $7 Second Preferred Stock outstanding, being the only classes of outstanding stock entitled to vote.

Management and Control

2. List the names and addresses of all directors and officers of the registrant. Indicate the office or offices held. If any person is both an officer and director, so state.

Name	Address	Office
Edgar H. Dixon	2 Rector Street, New York, N. Y.	Director Secretary-Treasurer
Joe H. Gill	Glenville Road, Greenwich, Conn.	Director President
F. T. Hepburn	63 Wall Street, New York, N. Y.	Director
Ernest W. Hill	2 Rector Street, New York, N. Y.	Director Vice President
H. L. Hollis	80 E. Jackson Blvd., Chicago, Ill.	Director
Arthur F. Hoffman	2 Rector Street, New York, N. Y.	Director Assistant Secretary Assistant Treasurer
Hunter S. Marston	Watch Hill, R. I.	Director
Harold F. Sanders	2 Rector Street, New York, N. Y.	Director Assistant Secretary Assistant Treasurer
E. B. Tracy	1 Wall Street, New York, N. Y.	Director
Arthur B. Groesbeck	Rusk Building, Houston, Texas	Vice President
J. V. Strange	Rusk Building, Houston, Texas	Vice President
L. V. Tracht	Rusk Building, Houston, Texas	Assistant Secretary Assistant Treasurer

[Fol. 557] EXHIBIT #6

United States of America

Securities and Exchange Commission

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Current report on Form 8-K filed with this Commission December 10, 1937 by United Gas Public Service Company, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-1230.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Com-

mission to be affixed this 17th day of October, A. D., 1939, at Washington, D. C.

Francis P. Brassor, Secretary. (Seal.)

Filed Nov. 29, 1939. J. C. Dale, Jr. C. & M.

Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 6 to the Stipulation filed by the defendant in this cause on the following grounds:

(1). It is incompetent, irrelevant and immaterial as to any issue involved in the cause.

(2). It is hearsay as to complainant, being a statement made by United Gas Public Service Company, and without any showing as to the knowledge or authorization of complainant or its consent thereto.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 557a] Securities and Exchange Commission,
Washington, D. C.

Form 8-K

For Current Reports

United Gas Public Service Company

(Name of Registrant)

Table of Securities Registered

Titles of issues registered	Names of exchanges on which registered
$6 Preferred Stock of United Gas Public Service Company (Cumulative No Par Value)	Boston Stock Exchange
First Mortgage 6½% Sinking Fund Gold Bonds, Series A, of Dixie Gulf Gas Company (Assumed by registrant)	Boston Stock Exchange

Titles of issues registered	Names of exchanges on which registered
First Mortgage 6% Sinking Fund Gold Bonds of The Palmer Corporation of Louisiana. (Assumed by registrant)	The Chicago Stock Exchange

Name and address of person authorized to receive notices and communications from the Securities and Exchange Commission:

S. L. Davis, Comptroller, United Gas Public Service Company, Rusk Building, Houston, Texas.

(Stamp:) Acknowledged by R. M. L. Sec. & Exch. Com. Recd. 1st Mail Dec. 10, 1937. Docket Mail & Files.

[fol. 557b] Merger of Registrant (United Gas Public Service Company) into United Gas Corporation, November 5, 1937

Registrant (United Gas Public Service Company) was merged into United Gas Corporation by the filing of Certificate of Ownership of United Gas Public Service Company by United Gas Corporation with the Secretary of State of the State of Delaware, November 5, 1937, copy of which is attached as Exhibit A.

This current report comprises:

(1) Pages numbered 1 and 2.
(2) The following exhibit:

Exhibit A Certificate of Ownership of United Gas Public Service Company by United Gas Corporation.

Signature of Registrant

In pursuance of the requirements of the Securities Exchange Act of 1934, the registrant, United Gas Public Service Company, a corporation organized and existing under the laws of Delaware has duly caused this current report to be signed on its behalf by the undersigned, thereunto duly authorized, and its seal to be hereunto affixed and at-

tested, all in the City of Houston and State of Texas on the 5th day of November, 1937.

Signature of Registrant, United Gas Public Service Company, by (Name and Title:) S. L. Davis, Comptroller. (Seal.)

Attest: (Name and Title:) J. H. Miracle, Secretary.

Date November 5, 1937.

(Stamp:) Sec. & Exch. Com. Recd. 1st Mail. Dec. 10, 1937. Docket Mail & Files.

[fol. 557c] Certificate of Ownership of United Gas Public Service Company by United Gas Corporation

Pursuant to Section 59A of Chapter 65 of the Revised Code of Delaware

(Stamp:) Sec. & Exch. Com. Recd. 1st Mail. Dec. 10, 1937. Docket Mail & Files.

[fol. 557d] Certificate of Ownership of United Gas Public Service Company by United Gas Corporation

Pursuant to Section 59A of Chapter 65 of the Revised Code of Delaware

United Gas Corporation, a Corporation formed under the laws of the State of Delaware, desiring to merge United Gas Public Service Company pursuant to the provisions of Section 59A of Chapter 65 of the Revised Code, Does Hereby Certify as follows:

First: That United Gas Corporation is a stock corporation formed under the laws of the State of Delaware, and its Certificate of Incorporation was filed in the office of the Secretary of State, Dover, Delaware, on the 29th day of March, 1930, and in the office of the Recorder of Kent County, on the 29th day of March, 1930.

Second: That on and prior to the 4th day of November, 1937, United Gas Public Service Company was a stock corporation formed under the laws of the State of Delaware and its Certificate of Incorporation was filed in the office of the Secretary of State, Dover, Delaware, on the 11th day of July, 1930, and in the office of the Recorder of Kent County, on the 11th day of July, 1930. That said corpora-

tion was organized for or was engaged in business similar or incidental to that of United Gas Corporation.

That on said 4th day of November, 1937, United Gas Corporation, lawfully owned all the stock of said United Gas Public Service Company, and on that day the Board of Directors of said United Gas Corporation, by resolution [fol. 557e] duly adopted, determined to merge said United Gas Public Service Company and to assume all of its obligations; said resolution being as follows:

"Whereas, United Gas Public Service Company was organized for or was and is now engaged in business similar or incidental to that of this corporation; and

"Whereas, this corporation has acquired and now lawfully owns all of the stock of United Gas Public Service Company and desires to merge said corporation and to have all of its estate, property, rights, privileges and franchises vested in and held and enjoyed by this corporation;

"Now Therefore, be it Resolved, that this corporation merge and it does hereby merge said United Gas Public Service Company and does hereby assume all of its obligations; and

"Further Resolved that the proper officers of this corporation be, and they hereby are, authorized and directed to make and execute, in its name and under its corporate seal, and to file in the proper public offices, a certificate of such ownership, setting forth a copy of this resolution; and

"Further Resolved that the officers of this corporation be, and they hereby are, authorized and directed to take such further action as in their judgment may be necessary or proper to consummate the merger provided for by this resolution."

In Witness Whereof, said United Gas Corporation has caused this Certificate to be executed by its officers thereunto duly authorized and its corporate seal to be hereunto affixed this 4th day of November, 1937.

United Gas Corporation, by Joe H. Gill, *President*; by E. H. Dixon, *Secretary*. (Seal United Gas Corporation, Delaware, 1930.)

[fol. 557f] State of New York,
County of New York, ss:

Be it remembered that on this 4th day of November, 1937, before me, a Notary Public in and for the County and State

aforesaid, personally came Joe H. Gill the President of United Gas Corporation, a corporation of the State of Delaware, party to the foregoing agreement, to me personally known, and personally known to me to be such President, and who being by me duly sworn, did depose and say that he is the President of United Gas Corporation, the corporation described in and which executed the foregoing Certificate of Ownership, that he resides in Miami Beach, Florida; that he knows the seal of said corporation, that the seal affixed to said Certificate is the common or corporate seal of said corporation; that it was affixed to said Certificate by authority of a majority of the directors for the uses and purposes therein expressed, and that by like authority and order he signed and subscribed his name thereto as President of said corporation and executed and acknowledged the same; that the signature of the President is in his own proper handwriting and said Joe H. Gill then and there acknowledged said Certificate before me to be his own act, deed and agreement and the corporate act, deed and agreement of said corporation.

Witness my hand and notarial seal.

Phyllis Hoffman, Notary Public. N. Y. Co. Clerk's No. 251. N. Y. Co. Reg. No. 9-H-104. Term expires March 30, 1939. (Seal, Phyllis Hoffman, Notary Public, New York County.)

[fol. 558] Complainant, Memphis Natural Gas Company, objects to exceptions to, and moves to strike out, Exhibit 7 to the Stipulation filed by the defendant in this cause on the ground that it is incompetent, irrelevant and immaterial as to any issue involved in the cause.

W. P. Armstrong, T. A. McEachern, Jr., Solicitors for Complainant.

[fol. 559] EXHIBIT 7 TO STIPULATION

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

No. 43690 R. D.

MEMPHIS NATURAL GAS COMPANY, Complainant,

against

MEMPHIS POWER & LIGHT COMPANY, Defendant

To the Honorable Chancellors of the Chancery Court of Shelby County, Tennessee:

For its complaint herein, the complainant, Memphis Natural Gas Company, by its attorneys, respectfully alleges and shows, upon information and belief:

1. The complainant, Memphis Natural Gas Company, is a corporation duly organized and existing under the laws [fol. 560] of the State of Delaware. The defendant Memphis Power & Light Company is a corporation duly organized and existing under the laws of the State of New Jersey, and is a public utility engaged, among other things, in the production and purchase of gas and the sale and distribution thereof to public and private consumers in the City of Memphis and in Shelby County, in the State of Tennessee, with an office for the transaction of such business in that City and County in the Western District of Tennessee.

2. The complainant, at all times since the construction and the placing in operation of the pipe line hereinafter mentioned, has been, and is now, engaged in the business of transmitting and selling to wholesale consumers natural gas, and for that purpose it owns, maintains and operates a pipe line from a point or points in the State of Louisiana, to a point at or near the corporate limits of the City of Memphis, in the State of Tennessee.

3. On or about May 24, 1928, the complainant and the defendant made, executed and delivered a contract and agreement, a copy of which (omitting the form of franchise ordinance attached thereto and marked Exhibit A) is annexed hereto as Exhibit A.

[fol. 561] 4. In and by the terms of the said contract, the complainant, as Seller, agreed, among other things, to sell

and deliver, and the defendant, as Buyer, agreed to purchase, take and pay for such amounts of natural gas as may be requisite (1) to fulfill all contracts made by the defendant for the sale of natural gas in the City of Memphis and in Shelby County, in the State of Tennessee, and (2) for use by the defendant for fuel in its electric generating plant or plants in accordance with a certain contract of even date therewith between the parties (Article "Second"); and the complainant agreed, within a time therein specified, to construct and put in operation a pipe line to supply the natural gas requirements of its customers, including the defendant (Article "Third"); and the defendant agreed, within a time as therein specified, to provide facilities for the connection of and to connect its gas distribution system with the pipe line to be built by the complainant (Article "Fourth").

5. The said contract became effective in accordance with the provisions of Article First thereof, and pursuant thereto the complainant duly constructed and put into operation a pipe line to supply the natural gas requirements of its customers, including the defendant, and the defendant duly installed facilities and connected its gas distribution system with the pipe line constructed by the complainant. Since [fol. 562] in or about the month of December, 1928, the complainant has sold and delivered, and the defendant has purchased and taken, natural gas as may have been required by the defendant for the purposes set forth in the said agreement.

6. All conditions precedent on the part of the complainant to be performed under the said contract of May 24, 1928, have been duly performed and have duly occurred.

7. Pursuant to the terms of said contract and subject to adjustment in accordance with the provisions of Article Eleventh thereof, the defendant agreed to pay to the complainant monthly for gas purchased thereunder during the preceding calendar month at specified rates according to classes of use for which gas was purchased by the defendant (Article "Sixth"); and it was further agreed in Article Ninth and Tenth as follows:

"Ninth": Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein some-

times referred to as a "contract year"), the Seller shall deliver to the Buyer and to the City of Memphis, a state-
[fol. 563] ment setting forth in reasonable detail:

"(1) The Seller's investment on the last day of the contract year covered by such statement used or useful for the transportation or supply of natural gas by the Seller to the Buyer. For the purposes of this agreement $7,300,000 is the amount of all expenditures and/or costs of the Seller in all pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations used or useful for the transportation or supply of natural gas necessary to construct and put in operation the pipe line, provided for under Article Third hereof, with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours and capable of expansion by the installation of additional compressor stations as marketing conditions may justify. For the purposes of this agreement, the Seller's investment on the last of any contract year used or useful for the transportation or supply of natural gas by the Seller to the Buyer shall consist of a (a) said amount of $7,300,000 and (b) all proper costs for any pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations, used or useful for the transportation or supply of natural
[fol. 564] gas by the Seller to the Buyer and incurred after the date when said pipe line to be built by the Seller pursuant to Article Third shall have been completed and put in operation and up to and including the last day of such contract year; provided, however, that if the Seller shall supply gas to others than the Buyer the sum of the amounts under (a) and (b) of this sentence shall be reduced in accordance with the relative amounts of gas supplied by the Seller to the Buyer and to others and with the relative amounts of investment used or useful for the transportation or supply of natural gas by the Seller to the Buyer and by the Seller to such other customers.

"(2) The gross revenues of the Seller from the sale of natural gas during such contract year delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyer's electric generating station or stations.

"(3) All costs of maintaining and operating the pipe lines, compressing stations, measuring equipment and other

[fol. 565] equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer for such contract year such costs to include all expenditures made for current operations and ordinary maintenance and all general, administrative and office expenses properly chargeable to the operation and maintenance of such pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations owned by the Seller in connection with the transportation or supply of natural gas by the Seller to the Buyer and including payments made by the Seller under its purchase contract or purchase contracts for natural gas delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyer's electric generating station or stations during such contract year and any and all reasonable costs of operation and maintenance of the pipe line, contemplated by this contract, not otherwise enumerated.

[fol. 566] "(4) All reasonable charges for such contract year, which may be agreed to by the Buyer which previous operation of the Seller's system for the transportation or supply of natural gas indicated to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

"(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Seller's investment, as above defined, in pipe lines, compressing stations, measuring equipment, and other equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer; provided, however, that there is not to be included in this amount any sum to amortize any portion of the Seller's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or [fol. 567] maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereunder. The replacement of any of the pipe lines, compressing stations, measuring equipment, or other equipment,

facilities or installations shall not prevent the completion of the amortization of the original.

"(6) All taxes payable during such contract year because of the ownership or operations by the Seller of the pipe lines, compressing stations, measuring equipment, or other equipment, facilities or installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer.

"(7) Six per cent of the Seller's investment, as above defined, on the last day of such contract year (without deduction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary maintenance, renewals, replacements, or amortization.

"(8) The net surplus or net deficit of the Seller for such [fol. 568] contract year, as determined by subtracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6) and (7) above.

"Tenth: Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each first and successive year being herein sometimes referred to as a "contract year"), the Buyer shall deliver to the Seller and to the City of Memphis a statement setting forth in reasonable details:

"(1) The Buyer's investment on the last day of the contract year covered by such statement used or useful for the distribution or supply of gas. For the purpose of this agreement $6,300,000 is the amount of the Buyer's investment at the date hereof used or useful for the distribution or supply of gas. For the purpose of this agreement the Buyer's investment on the last day of any contract year used or useful for the distribution of supply of gas shall [fol. 569] consist of (a) said amount of $6,300,000 and (b) all proper costs for any pipe lines, regulating stations, measuring equipment and other equipment, facilities and installations, used or useful for the distribution or supply of natural gas and incurred after the date hereof and up to and including the last day of such contract year.

"(2) The gross revenues of the Buyer from the sale of natural gas during such contract year.

"(3) All costs of maintaining and operating the pipe lines, regulating stations, measuring equipment and other equipment, facilities and installations owned by the Buyer and used or useful for the distribution or supply of natural gas by the Buyer (including its manufactured gas plant required to be maintained as an emergency and a stand-by plant in connection with the distribution of natural gas) for such contract year, such costs to include all expenditures made for current operation and ordinary maintenance and all general, administrative and office expenses properly chargeable to the operation and maintenance of such pipe lines, regulating stations, measuring equipment and other [fol. 570] equipment, facilities and installations owned by the Buyer in connection with the distribution or supply of natural gas by the Buyer and including payments made by the Buyer for the amount of natural gas delivered by the Seller to the Buyer hereunder during such contract year and any and all reasonable costs of operation and maintenance not otherwise enumerated.

"(4) All reasonable charges for such contract year which may be agreed to by the Seller and which previous operation of the Buyer's system for the distribution or supply of natural gas indicates to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

"(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Buyer's investment under clause (b) of (1) above in pipe lines, regulating stations, measuring equipment, and other equipment, facilities and installations owned by the Buyer and used or useful for the distribution or supply of natural gas; pro- [fol. 571] vided, however, that there is not to be included in this amount any sum to amortize any portion of the Buyer's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereunder. The replacement of any of the pipe lines, regulating stations, measuring equipment, or other equipment, facilities

or installations shall not prevent the completion of the amortization of the original.

"(6) All taxes payable during such contract year because of the ownership or operation by the Buyer of the pipe lines, regulating stations, measuring equipment, or other equipment, facilities or installations owned by the Buyer and used or useful for the distribution or supply of natural gas, including said manufactured gas plant.

"(7) Six per cent of the Buyer's investment, as above defined, on the last day of such contract year (without de- [fol. 572] duction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary maintenance, renewals, replacements, or amortization.)

"(8) The net surplus or net deficit of the Buyer for such contract year as determined by subtracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6), and (7) above.

In and by Article Eleventh of the said agreement, it was further agreed, in part, that the amount of combined net surpluses or combined net deficits of the defendant and the complainant for each contract year, as shown by the statements referred to in Article Ninth and Tenth should, with certain limitations, be equally divided between the defendant and the complainant by a cash adjustment to be made each year as soon as possible after the rendering of the statements provided for in Articles Ninth and Tenth.

8. In pursuance of Articles Ninth and Tenth of the contract, the complainant and the defendant for each of the [fol. 573] years from 1929 to ~~1937, both inclusive,~~ have delivered each to the other and to the City of Memphis, within three months after the expiration of each "contract year," a statement setting forth the items enumerated and described in Article Ninth and Tenth, respectively, and, in pursuance of Articles Eleventh of the contract, the amount of the combined net surpluses and combined net deficits of the defendant and the complainant for each contract year, as shown by the statements rendered under Articles Ninth and Tenth thereof, have been equally divided between the defendant and the complainant by cash adjustment made each year within a reasonable time after the rendering of

the statements provided for in Articles Ninth and Tenth thereof.

9. In each of the annual statements rendered by the defendant to the complainant for the years 1928 to 1937, inclusive, the defendant included charges for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance, aggregating the sum of $1,466,439.98, while the actual charges for renewals and replacements (plus removal cost, less salvage) made during those years amounted to $361,952.34, and the defendant has accumulated a fund for such purpose which, as of December 31, 1937, amounted to $1,104,487.64.

[fol. 574] 10. The annual division of combined net surpluses or combined net deficits between the complainant and the defendant, pursuant to Article Eleventh of the contract, were made upon the inclusion in the statement rendered by the defendant for the years 1928 to 1937, inclusive of the charges set forth in the preceding paragraph hereof, and has resulted in an accumulation of a reserve by the defendant in the sum of $1,104,487.64 in excess of the amount to which the defendant was justly entitled as reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance, and such charges were unwarranted and contrary to the provisions of the contract of May 24, 1928.

11. The defendant has entered into certain agreements to sell and convey to the City of Memphis certain of its properties, including its properties used in the distribution and supply of gas, and to terminate and discontinue its supply of gas on and after the date of the transfer of the title to its gas properties, which is now set for the 27th day of June 1939. Following the sale and conveyance of certain of its properties to the City of Memphis, it is the intention of the defendant to dissolve its corporate existence and distribute its remaining assets to its stockholders. Among such assets is the fund or reserve of $1,104,487.64 accumulated by the [fol. 575] defendant as aforesaid. Upon the discontinuance and termination by the defendant of the distribution and supply of gas as aforesaid, the balance of $1,104,487.64 in said fund or reserve cannot be used for the purpose provided in Article Tenth, and cannot "be used in meeting costs of renewals, replacements, or extraordinary maintenance."

12. The complainant claims to have an interest in the said fund or reserve of $1,104,487.64, and to be entitled to the payment of its proportionate share therein amounting to at least $552,000, and has demanded and hereby demands such payment, but the defendant disputes the claim and has refused and still refuses to pay the said sum to the complainant.

13. Within the three months' period after the expiration of the contract year ended December 31, 1938, the complainant and the defendant each rendered to the other and to the City of Memphis their respective statements under Articles Ninth and Tenth for the contract year ended December 31, 1938. In its statement for the year ended December 31, 1938, the defendant has included charges for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance aggregating the sum of $143,645.65, while the actual charges [fol. 576] for renewals and replacements (plus removal cost, less salvage) made during 1938 amounted to only $9,306. The average annual cost of renewals and replacements by the defendant for the ten-year period 1928 to 1937, both inclusive, was not more than $36,195, and the average annual cost of renewals and replacements by the defendant for the eleven-year period 1928 to 1938, both inclusive, was not more than $33,750. The charges made by the defendant for renewals and replacements for the year 1938 of $143,645.65 is unwarranted and is contrary to the provisions of the said contract of May 24, 1928. Moreover, by reason of the contemplated sale by the defendant of its property to the City of Memphis, all as is more fully set forth in paragraph 11 hereof, the charge made by it for the year ended December 31, 1938, for the purpose of meeting costs of renewals, replacements or extraordinary maintenance could not be used by the defendant for such purpose.

14. The complainant has not agreed to the charge of $143,645.65 for the year ended December 31, 1938, and avers that such a charge is unreasonable, improper and contrary to the provisions of the said contract, but the defendant has failed and refused to adjust the statement of gas revenues, expenses and charges so as to withdraw and eliminate the excessive charge for renewals, replacements or extraordi- [fol. 577] nary maintenance for the year 1938.

15. In addition to the charge of $143,645.65 for renewal and replacement reserve included in the statement rendered by the defendant for the year ended December 31, 1938, other items are claimed by the complainant to have been improperly included by the defendant for miscellaneous and general expenses, legal expenses, discount on taxes paid to the City of Memphis, and amortization, such disputed items aggregating at least $26,951.70, but the defendant has refused and still refuses to eliminate such items from its statement and claims to be entitled to take the same into account in computing the amount to be paid under said contract.

16. Upon the completion of the sale by the defendant of its properties, as in paragraph 11 hereof more fully alleged, it will become necessary for the complainant and the defendant to adjust the payments made for the gas delivered and sold by the complainant to the defendant for the period January 1, 1939, to June 27, 1939, and for the complainant and the defendant each to deliver to the other and to the City of Memphis a statement setting forth the items enumer- [fol. 578] ated and described in Articles Ninth and Tenth, respectively, of the contract, and, in pursuance of Article Eleventh of the contract, the amount of the combined net surpluses or combined net deficits of the defendant and the complainant for the indicated period.

17. If the defendant, as it intends to do, asserted the same basis for charges for a reserve or fund for meeting costs of renewals, replacements or extraordinary maintenance, not covered by current operations or ordinary maintenance, for the period January 1, 1939, to June 27, 1939, as it has asserted for the year 1938, the amount so claimed for such period would likewise be far in excess of the amounts reasonably necessary for such purposes, and would be unwarranted and contrary to the provisions of the contract of May 24, 1928.

18. Upon the completion of the sale by the defendant of its property to the City of Memphis, as in paragraph 11 hereof more fully set forth, any amounts claimed or that may be claimed by the defendant as proper charges for a reserve to be used in meeting costs of renewals, replacements or extraordinary maintenance for the period Janu- [fol. 579] ary 1, 1939, to June 27, 1939, could no longer be used and applied to such purposes, and the complainant

claims that no such charges are or would be proper for such period.

Premises Considered, complainant prays:

1. That subpoena issue and be served upon the defendant, Memphis Power & Light Company, requiring it to answer this complaint at the next rule day of this court, but not under oath, its oath to its answer being specifically waived.

2. That this court adjudge the amounts charged by the defendant for each of the years 1928 to 1937 for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance, aggregating $1,466,439.98, are excessive and unauthorized by any of the terms or provisions of the contract between the complainant and the defendant by at least $1,104,487.64.

3. That this court adjudge that upon the completion of the sale by the defendant of its properties to the City of Memphis, the amount accumulated by the defendant in [fol. 580] its fund or reserve for meeting costs of renewals, replacements or extraordinary maintenance for the years 1928 to 1937, aggregating $1,104,487.64 cannot be used and applied to such purpose.

4. That this court adjudge that the complainant has an interest in the fund or reserve accumulated by the defendant for meeting costs of renewals, replacements or extraordinary maintenance for the years 1928 to 1937, aggregating $1,104,487.64 and is entitled to recover from the defendant its proportionate share of said sum amounting to at least $552,000, and be granted a decree against the defendant for said sum or such amount found rightfully to be due complainant.

5. That this court adjudged that the amount charged by the defendant for the year ended December 31, 1938, for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance, aggregating $143,645.64, is excessive, is not reasonably necessary for such purpose, will not be used for such purpose, and is contrary to the terms and provisions of the contract between the complainant and the defendant, and that such sum is not properly to be included in the de-

[fol. 581] fendant's said statement for the contract year 1938.

6. That the amounts properly includible by the defendant in its statement for the year ended December 31, 1938, in respect of the items of which complaint is made in paragraph 15 hereof, be determined and adjusted in accordance with the respective rights of the parties.

7. That the amounts, if any, that may be properly charged by the defendant for the period January 1, 1939, to June 27, 1939, for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements or extraordinary maintenance, be determined and adjusted in accordance with the respective rights of the parties.

8. That the complainant have such other and further relief as to the court may seem just and proper.

9. That the complainant recover its costs and disbursements.

(Signed) Canada & Russell, Solicitors for Complainant.

[fol. 582] Exhibit "A" to Bill of Complaint

This Agreement, made and entered into as of this 24th day of May, 1928, by and between Memphis Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the Seller, party of the first part, and Memphis Power & Light Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the Buyer party of the second part;

Whereas, the Seller desires to sell and deliver to the Buyer and the Buyer desires to purchase natural gas, as hereinafter provided, and

Whereas, the Seller and the Buyer are about to expend large sums of money, respectively, to prepare to deliver and distribute natural gas;

Now, Therefore, this Agreement Witnesseth: That the parties hereto in consideration of the covenants and payments herein set forth have covenanted and agreed, and do hereby covenant and agree as follows:

First: This agreement shall take effect if and when a franchise ordinance in the form hereto attached marked Ex- [fol. 583] hibit A shall have become effective after the due passage thereof by the Board of Commissioners of the City of Memphis, Tennessee, and approval thereof by the Mayor of said City, and after the due approval thereof by the Railroad and Public Utilities Commission of the State of Tennessee, and the parties hereto agree to cooperate and use their best efforts to obtain such passage and approval of said ordinance so soon as possible after the date hereof.

Second: The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as may be requisite (1) to fulfill all contracts made by the Buyer for the sale of natural gas in the City of Memphis and in Shelby County, Tennessee, and (2) for use by the Buyer for fuel in its electric generating plant or plants in accordance with the contract of even date herewith between the parties hereto. The Buyer agrees that it will advise the Seller's representative as far in advance of changes in its demands as operating conditions will permit. Provided, however, that the Seller shall not be obligated to sell and deliver natural gas in excess of the amount it has currently available for delivery, as defined in Articles [fol. 584] Twelfth, Thirteenth and Fourteenth hereof.

Third: The Seller agrees to construct and put in operation a pipe line to supply the natural gas requirements of its customers, including Memphis Power & Light Company, with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours, which will be capable of expansion by the installation of additional compressor stations as marketing condisions may justify, from a site to be selected by the Seller and Industrial Gas Company at or near Fowler, Louisiana, to a point at or near the corporate limits of the City of Memphis, Tennessee, to be selected by the parties hereto, if said pipe line runs through Arkansas, or to a point to be so selected, at or near Nonconnah Creek, if said pipe line runs through Mississippi, the point finally so selected by the parties hereto being sometimes referred to herein as the point of delivery. The Seller agrees to commence construction of said line and all facilities relating thereto within thirty days from the date when this agreement shall take effect, and to complete said line ready to deliver gas at the point of delivery on

or before the expiration of nine months from the date hereby [fol. 585] fixed for the commencement of the construction of said line subject to an extension equalling any delays in the construction of said line caused by acts of God, the elements, labor troubles, accidents, and any and all other causes not reasonably within the control of the Seller.

Fourth: The Buyer agrees coincidentally with commencement of the construction of said pipe line by the Seller to commence the construction and installation of a pipe line to connect its gas distribution system with the pipe line, to be built by the Seller, at the point of delivery and to construct and install, ready for operation, the necessary connections at the place of delivery to enable the Seller to make connection with the distribution system of the Buyer, and to complete the installation of all such facilities, ready for operation, on or before the completion of the pipe line to be built by the Seller. The Buyer further agrees, coincidentally with the construction of said pipe line by the Seller, to adapt its gas distribution system to the distribution and supply of natural gas, and during the continuance of this agreement for the purchase and sale of natural gas to use its best efforts to develop a market, both domestic and industrial, for natural gas in the territory served by the Buyer.

Fifth: The place of delivery of the natural gas deliver- [fol. 586] able hereunder is at the said point at or near the corporate limits of the City of Memphis or said point at or near Nonconnah Creek, as the case may be, finally selected by the parties hereto, and the Seller shall there furnish, install, operate, and maintain at its own expense a regulating and measuring station properly equipped with orifice meters and recording gauges, or other type of meter or meters of standard type as may be mutually agreed upon the readings and/or records of which shall fix the total amount of natural gas delivered by the Seller to the Buyer.

The measuring equipment so installed by the Seller, together with any building erected by it for such equipment, shall be and remain its property. The Buyer shall have access to said metering equipment at all reasonable times, but the reading calibrating and adjusting thereof and changing of charts shall be done only by the employees or agents of the Seller. Charts and records from such metering

equipment shall remain the property of the Seller. Upon request of Buyer, the Seller will submit to the Buyer records and charts from its metering equipment, together with calculations therefrom, for the Buyer's inspection and verification, subject to return by the Buyer, within ten (10) days after receipt thereof, after which return the charts and [fol. 587] records shall be kept on file by the Seller for the mutual use of both parties. At least twice each month, and on dates as near the first and sixteenth of the month as practicable, the Seller shall calibrate its meter in the presence of representatives of the Buyer and the parties shall jointly observe any adjustments which are made to the meter should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by the Buyer in the presence of representatives of the Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for [fol. 588] any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight (8) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and

agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter, or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries [fol. 589] during preceding periods under similar conditions when the meter was registering accurately.

The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces gauge pressure above fourteen and sixty-five hundredths (14.65) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and sixty-five hundredths (14.65) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such time and [fol. 590] places as, in accordance with good practice, may be agreed upon from time to time between the Seller and the Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meters shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter.

The weighted average hourly temperature recorded each twenty—— hour (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16th) of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first fifteen (15) days of such calendar month or until changed by special test, the special test to be applicable from the [fol. 591] day made and through the following days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) day of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by special test, the special test to be applicable from the day made through the remaining days in such calendar month.

The Buyer may at its option and at its cost and expense install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the point of delivery as specified herein is on the premises of the Seller, the Seller grants to the Buyer the right of free use and ingress and egress to such metering equipment at all times for the purpose of installation, operation, repair and/or removal. The check metering equipment and the method [fol. 592] of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but the Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of the Seller as to type and method of installation. In the event check metering equipment is installed by the Buyer, the Seller

shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by employes or agents of the Buyer. Charts and records from said check metering equipment shall remain the property of the Buyer. Upon request of the Seller, the Buyer shall submit to the Seller records and charts from said check metering equipment, together with calculations therefrom for the Seller's inspection and verification, subject to return by the Seller within ten (10) days after receipt thereof.

The Seller shall render to the Buyer, on or before the fifteenth (15-) day of each month, a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller therefor at the rates for natural gas herein set forth in Article Sixth. Unless exceptions thereto in writing shall be made by the [fol. 593] Buyer within ten (10) days after it shall receive such statement, the statements of deliveries so furnished by the Seller to the Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments then pending and excepting for adjustments made in accordance with the provisions of Article Eleventh hereof.

Sixth: Subject to adjustment in accordance with the provisions of Article Eleventh hereof, the Buyer shall pay the Seller monthly for gas purchased hereunder during the preceding calendar month at the following rates:

(a) For gas purchased for use for domestic cooking and water heating, 30 cents for each thousand cubic feet;

(b) For gas purchased for use for domestic house-heating 25 cents for each thousand cubic feet;

(c) For gas purchased for use for commercial purposes, 25 cents for each thousand cubic feet;

(d) For gas purchased for use for commercial heating, 15 cents for each thousand cubic feet;

(e) For gas purchased for use for industrial purposes, 13 cents for each thousand cubic feet; and

[fol. 594] (f) For all other gas delivered by the Seller to the Buyer at the point of delivery during the preceding calendar month (except gas delivered to the Buyer in ac-

cordance with the contract between the parties hereto of even date herewith for the purchase and sale of natural gas for use in the electric generating station or stations of the Buyer) 13 cents for each thousand cubic feet (such other gas referred to in this subdivision (f) being herein sometimes called "unaccounted for gas").

Seventh: The separation of the total amount of gas purchased by the Buyer into the respective portions purchased for the respective classes of use referred to in subdivisions (a) to (f), both inclusive, of article Sixth hereof, shall, for the purposes of payment, be determined as follows:

(a) Of the total amount of gas purchased hereunder, the respective portions purchased for each of the respective purposes referred to in subdivisions (a) to (e), both inclusive, of Article Sixth hereof, shall be considered to be respect[illegible] amounts actually sold for each of said respective purposes, as determined from the records of the Buyer's meters in connection with said respective uses, computed at a pressure of eight ounces above 14.65 pounds [fol. 595] absolute (barometric) pressure, and on the basis of the temperatures and specific gravities established, as hereinbefore provided, at the place of delivery for corresponding periods of time. For the purpose of this subdivision (a) of this Article Seventh, all gas sold by the Buyer for domestic service at a rate of Seventy-five (75) cents or more per thousand cubic feet shall be deemed to be gas purchased hereunder for use for domestic cooking and water heating, and all gas sold by the Buyer for domestic service at a rate of less than Seventy-five (75¢) cents per thousand cubic feet shall be deemed to be gas purchased hereunder for use for domestic house heating. The Buyer shall render to the Seller on or before the tenth day of each calendar month a statement showing the quantities of gas sold for each of the respective purposes mentioned in subdivisions (a) to (e), both inclusive, of said Article Sixth during the preceding calendar month.

(b) The amount of unaccounted for gas referred to in subdivision (f) of Article Sixth shall be determined by subtracting from the total amount of gas delivered by the Seller to the Buyer at the place of delivery during the month the amounts of gas purchased for the respective purposes mentioned in subdivisions (a) to (e), both inclusive,

of said Article Sixth, determined as provided in subdivision (a) of this Article, and by subtracting also the amount of [fol. 596] gas purchased by the Buyer under said contract of even date herewith for use in its electric generating station or stations, determined as provided in said contract of even date herewith.

The Seller's meters at the place of delivery shall be read for billing purposes as nearly as practicable at the end of each calendar month, and the meters of the Buyer for the records required under subsection (a) and (b), immediately preceding, shall be read as nearly as practicable at the end of each calendar month.

Eighth: The Buyer agrees to pay the Seller at its office in Memphis, Tennessee, on or before the twenty-fifth (25th) of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent (6%) per annum from the date when such amount was due to the date of payment. In the event that at any time because of failure or inability of the Seller to deliver all or any portion of the natural gas needed by the Buyer to supply its customers, the Buyer is obliged to manufacture and supply to its customers manufactured gas, an equitable [fol. 597] adjustment shall be made between the parties hereto for the natural gas, if any, supplied by the Seller to the Buyer during such period and for the manufactured gas supplied by the Buyer into its system during such period.

Ninth: Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein sometimes referred to as a "contract year") the Seller shall deliver to the Buyer and to the City of Memphis, a statement setting forth in reasonable detail:

(1) The Seller's investment on the last day of the contract year covered by such statement used or useful for the transportation or supply of natural gas by the Seller to the Buyer. For the purposes of this agreement $7,300,-

000 is the amount of all expenditures and/or of the Seller in all pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations used or useful for the transportation or supply of natural gas necessary to construct and put in operation the pipe line, pro-
[fol. 598] vided for under Article Third hereof, with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours and capable of expansion by the installation of additional compressor stations as marketing conditions may justify. For the purposes of this agreement, the Seller's investment on the last of any contract year used or useful for the transportation or supply of natural gas by the Seller to the Buyer shall consist of (a) said amount of $7,300,000 and (b) all proper costs for any pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations, used or useful for the transportation or supply of natural gas by the Seller to the Buyer and incurred after the date when said pipe line to be built by the Seller pursuant to Article Third shall have been completed and put in operation and up to and including the last day of such contract year; provided, however, that if the Seller shall supply gas to others than the Buyer the sum of the amounts under (a) and (b) of this sentence shall be reduced in accordance with the relative amounts of gas supplied by the Seller to the Buyer and to others and with the relative amounts of investment used or useful for the transportation or supply of natural gas by the Seller to the Buyer and by the Seller to such other customers.

[fol. 599] (2) The gross revenues of the Seller from the sale of natural gas during such contract year delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyer's electric generating station or stations.

(3) All costs of maintaining and operating the pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer for such contract year such costs to include all expenditures made for current operations and ordinary maintenance and all general administrative and office expenses properly chargeable to the operation and maintenance of such pipe lines, com-

pressing stations, measuring equipment and other equipment, facilities and installations owned by the Seller in connection with the transportation or supply of natural gas by the Seller to the Buyer and including payments made by the Seller under its purchase contract or purchase contracts for natural gas delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyers electric generating station or stations during such contract year and any and all reasonable costs of operation and maintenance of the pipe line, contemplated by this contract, not other-
[fol. 600] wise enumerated.

(4) All reasonable charges for such contract year which may be agreed to by the Buyer which previous operation of the Seller's system for the transportation or supply of natural gas indicates to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Seller's investment, as above defined, in pipe lines, compressing stations, measuring equipment, and other equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer; provided, however, that there is not to be included in this amount any sum to amortize any portion of the Seller's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereunder. The replacement of any of the pipe lines,
[fol. 601] compressing stations, measuring equipment, or other equipment, facilities or installations shall not prevent the completion of the amortization of the original.

(6) All taxes payable during such contract year because of the ownership or operations by the Seller of the pipe lines, compressing stations, measuring equipment, or other equipment, facilities or installations owned by the Seller

and used or useful for the transportation or supply of natural gas by the Seller to the Buyer.

(7) Six per cent of the Seller's investment, as above defined, on the last day of such contract year (without deduction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary maintenance, renewals, replacements, or amortization.

(8) The net surplus or net deficit of the Seller for such contract year, as determined by subtracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6), and (7) above.

Tenth: Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein sometimes referred to as a "contract year"), the Buyer shall deliver [fol. 602] to the Seller and to the City of Memphis a statement setting forth in reasonable details:

(1) The Buyer's investment on the last day of the contract year covered by such statement used or useful for the distribution or supply of gas. For the purpose of this agreement $6,300,000 is the amount of the Buyer's investment at the date hereof used or useful for the distribution or supply of gas. For the purpose of this agreement the Buyer's investment on the last day of any contract year used or useful for the distribution or supply of gas shall consist of (a) said amount of $6,300,000 and (b) all proper costs for any pipe lines, regulating stations, measuring equipment and other equipment, facilities and installations, used or useful for the distribution or supply of natural gas and incurred after the date hereof and up to and including the last day of such contract year.

(2) The gross revenues of the Buyer from the sale of natural gas during such contract year.

(3) All costs of maintaining and operating the pipe lines regulating stations, measuring equipment and other equipment, facilities and installations owned by the Buyer and used or useful for the distribution or supply of natural gas by the Buyer (including its manufactured gas plant re- [fol. 603] quired to be maintained as an emergency and a stand-by plant in connection with the distribution of natural

gas) for such contract year, such costs to include all expenditures made for current operation and ordinary maintenance and all general, administrative and office expenses properly chargeable to the operation and maintenance of such pipe lines, regulating stations, measuring equipment and other equipment, facilities and installations owned by the Buyer in connection with the distribution or supply of natural gas by the Buyer and including payments made by the Buyer for the amount of natural gas delivered by the Seller to the Buyer hereunder during such contract year and any and all reasonable costs of operation and maintenance not otherwise enumerated.

(4) All reasonable charges for such contract year which may be agreed to by the Seller and which previous operation of the Buyer's system for the distribution or supply of natural gas indicates to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meet —costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Buyer's investment under clause (b) of (1) above in pipe lines, regulating stations, measuring equipment, and other equipment, [fol. 604] facilities and installations owned by the Buyer and used or useful for the distribution or supply of natural gas; provided, however, that there is not to be included in this amount any sum to amortize any portion of the Buyer's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereunder. The replacement of any of the pipe lines, regulating stations, measuring equipment, or other equipment, facilities or installation shall not prevent the completion or the amortization of the original.

(6) All taxes during such contract year because of the ownership or operation by the Buyer of the pipe lines, regulating stations, measuring equipment, or other equipment, facilities, or installations owned by the Buyer and

used or useful for the distribution or supply of natural gas, including said manufactured gas plant.

(7) Six per cent of the Buyer's investment, as above defined, on the last day of such contract year (without deduction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary mainte- [fol. 605] nance, renewals, replacements, or amortization).

(8) The net surplus or net deficit of the Buyer for such contract year as determined by subtracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6), and (7) above.

Eleventh: It is understood and agreed by the parties hereto that the amount of the combined net surpluses or combined net deficits of the Buyer and the Seller for each contract year, as shown by the statements rendered under Article- Ninth and Tenth hereof, shall (until after the provisions of the next succeeding paragraph shall have become operative) be equally divided between the Buyer and the Seller by a cash adjustment to be made each year as soon as possible after the rendering of the statements provided for in Article- Ninth and Tenth hereof, and at the same time the parties shall agree upon such adjustment, if any, in the rates set forth in Article Sixth hereof as may be calculated to be necessary in order as nearly as possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years.

If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown [fol. 606] by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the Seller and thereafter no further changes in the rates set forth in Article Sixth hereof (or in such rates as theretofore adjusted under the foregoing provisions of this Article

Eleventh) shall be made except such changes in such rates, if any, as may be required under the provisions of the next succeeding paragraph of this Article Eleventh. In all subsequent contract years, the entire balance of the Buyer's net surplus for each subsequent contract year over and above an amount equal to one and one-half per cent of the amount of the Buyer's investment shown under (7) of the statement rendered under Article Tenth for such subsequent contract year shall be paid to the Seller.

In each and every contract year during the continuance of this agreement or any extension thereof after (A) all [fol. 607] the net deficits of both parties for all contract years up to such time as shown by the statements rendered under Article Ninth and Tenth hereof, shall have been made up and (B) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, and (C) in addition thereto, the Seller shall have received from the combined net surpluses, as shown by such statements, net earnings affording it a reasonable return in view of the hazards of the undertaking of the Seller at the inception thereof, upon the respective amounts of the Seller's investment shown under (7) of the statements rendered under Article Ninth for all contract years up to such time, then the Seller and the Buyer agree to and will cooperate to bring about a reduction in the rates to be charged by the Buyer to its customers in the following manner:

1. The parties shall agree upon such adjustment in the rates set forth in Article Sixth here of (or in such rates as theretofore adjusted under this Article Eleventh as may be calculated to be necessary in order as nearly as possible. [fol. 608] to reduce the operating expenses of the Buyer in subsequent contract years by an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph, and

2. The Buyer shall then reduce its rates to its consumers in such amount as may be calculated to be necessary in order as nearly as possible to effect a reduction in the gross

revenues of the Buyer for ensuing contract years in an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph. It is agreed that such reduction of rates by the Buyer pursuant to the provisions of this paragraph of this Article Eleventh, shall be applied first toward lowering the price of gas to domestic consumers.

Each party shall have the right to examine the books, records, vouchers, and charts of the other party to the extent [fol. 609] necessary to verify the accuracy of any statement, charge, or adjustment made pursuant to the provisions of any Article hereof. If such examination reveals any inaccuracy in the statements, charges, or adjustments theretofore made, the necessary adjustments shall be promptly made.

The City of Memphis shall have the right by a reputable firm of certified public accountants or engineers, appointed by resolution of the City Commissioners, to examine the books and accounts of the parties hereto to the extent necessary to verify the accuracy of any statement or adjustment made under or pursuant to the provisions of said Articles Ninth, Tenth or Eleventh. If such examination reveals any inaccuracy in the statements or adjustments theretofore made, the necessary adjustments shall be promptly made.

Twelfth: The Seller agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption or supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure, or shortage of production of gas wells or fields, breakage, or accident to lines or equipment, fires, strikes, riots, floods, earthquakes, and other acts of whatever nature due to causes beyond its control, and interruptions by governmental or court orders. The Seller shall [fol. 610] only be bound to furnish natural gas to the full extent that it may be able to do so through the exercise of reasonable care and diligence in the procuring of natural gas from its gas purchase contract or contracts, and in the transportation thereof through its lines to the point of delivery and for such period of time as natural gas is available. It is expressly agreed by the Buyer that the Seller may interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and

compressing station equipment and machinery, but only for such time as may be reasonable or unavoidable, and the Seller shall give to the Buyer except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruption so as to inconvenience the Buyer and the other consumers of the Seller as little as possible. Nothing herein shall in any way abridge the right of the Seller at any time to sell, transport and deliver natural gas to others than the Buyer, or restrict or reserve the Seller's properties or any part of them for the exclusive benefit of, this contract, but the Seller shall not give other contracts entered into subsequent to the date of this contract any priority or preference above the obligations hereunder. In case of shortage of gas and necessity for curtailment, delivery of gas quotas to the Buyer and such other customers to which the Seller may sell natural gas shall be on a pro rata basis; but the Seller and Buyer [fol. 611] agree that as to consumers supplied with gas by them or either of them the supply to patrons classified as domestic consumers shall be given preference over the supply to industrial users. For the purpose of this agreement, any person, firm or corporation paying the regular domestic rate shall be deemed a domestic consumer.

Thirteenth: It is understood that Seller purposes to obtain its natural gas for delivery hereunder from a gas purchase contract or contracts with owners of lands in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, in the fields commonly known as the Monroe Gas field and the Richland gas field, and Seller shall not be required to supply hereunder natural gas from any other source, but Seller shall have the right if it so elects to supply hereunder natural gas from other sources, provided such other natural gas is not substantially inferior in quality to the natural gas then being produced from said Monroe and/or Richland gas fields.

Fourteenth: The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that the Seller may extract or permit the extraction of any helium content and the natural gas gasoline [fol. 612] from said natural gas. The Seller is to tender delivery to the Buyer only of natural gas which is commercial in quality and condition and of an average gross heating value of not less than 950 B. T. U. per cubic foot.

All deliveries of natural gas hereunder shall be at a pressure at a point of delivery of at least 100 pounds gauge per square inch.

Fifteenth: This agreement shall continue for fifteen (15) years from the day when the Seller's natural gas pipe line from the Monroe Field to Memphis, Tennessee, is ready to deliver natural gas hereunder.

The Seller agrees to give the Buyer at least three (3) months notice of the day when its said pipe line will be ready to deliver gas and the Seller agrees to be ready to deliver natural gas at the maturity of said notice.

If at the end of said period of fifteen (15) years hereinbefore mentioned and referred to, the Seller has natural gas available to continue supplying the Buyer with gas, then this agreement shall be and it hereby is extended on all the same terms and conditions as hereinabove set forth (except as to the price to be paid the Seller for the gas during the extension period) for a period of ten (10) years from and [fol. 613] after the expiration of such fifteen (15) years, or if the Seller's gas supply is not sufficient for ten (10) years then for such period less than ten (10) years during which the Seller has natural gas so available. The price to be paid the Seller for gas hereunder after the end of said first fifteen (15) years hereinabove mentioned shall be the then reasonable price therefor, and if not otherwise agreed to by the parties hereto at least six (6) months before the end of such fifteen (15) years, shall be determined by a Board of Three Arbitrators to be selected as follows: Either of the parties hereto may at any time after the beginning of such last mentioned period of six (6) months notify the other party hereto of the name of an arbitrator and if such other party shall fail within twenty (20) days to name a second arbitrator, then the party who first served the notice may on reasonable notice to the other party apply to the person who is the Judge then senior in office of the District Court of the United States of America having jurisdiction for the Western Division of the Western District of Tennessee or any Federal Court of similar jurisdiction in said Division for the appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after

[fol. 614] the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties here to may in like manner on reasonable notice to the other party apply to the person who is such Judge for the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as the third arbitrator. The Board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the price thus to be paid for such gas.

The action of a majority of the members of such Board shall govern and their decision shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Sixteenth: In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payment of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as pos- [fol. 615] sible after the occurrence of the cause relied on, then the obligations of the party giving notice so far as they are affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightening, earthquakes, fires, storms, floods, washouts, arrests and restraint or rulers and people civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, sudden partial or entire failure of natural gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

Seven-th: Unless otherwise provided, all notices to be given hereunder by the Seller to the Buyer shall be given by registered mail or by delivering the same to the Buyer at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Buyer for the pur- [fol. 616] pose, and all notices to be given by the Buyer to the Seller shall be given by registered mail or by delivering the same to the Seller at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Seller for the purpose.

Eighteenth. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Whenever any corporation is referred to herein, such reference shall be deemed to include the successors and assigns of any such corporation.

Nineteenth: As between the parties hereto, the Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury cause- thereby until the same shall have been delivered to the Buyer at the place of delivery, after which delivery the Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

In Witness Whereof, the parties hereto have caused this agreement to be duly signed by their respective officers as of the day and year first above written.

[fols. 617-620] Memphis Natural Gas Company, by (Signed) Birger L. Johnson, Vice President.

Attest: (Signed), E. F. Berberich, Secretary.

Memphis Power & Light Company, by (Signed) L. H. Parkhurst, Vice President.

Attest: (Signed) H. L. Martin, Secretary.

[fol. 621] In Chancery Court of Davidson County

[Title omitted]

Findings of Fact—Filed March 1, 1940

The record in this cause presents a mixed question of law and fact growing out of the claim by the defendants, officials

of the State, that the complainant is liable for an assessment for excise taxes for the years 1932 to 1935 inclusive, amounting to about $60,000.00.

It is the contention of the complainant that it is engaged solely and exclusively in interstate commerce and that all of its earnings during the years in question arose entirely from interstate business, which is especially excluded from the provisions of the excise tax law, while the defendants claim that the business done by the complainant, or at least a part thereof, is intrastate commerce, and therefore the complain-
[fol. 622] ant is liable for excise taxes for the years in question.

There is very little if any, conflict in the testimony as to the actual business transacted by the complainant, the controversy in this regard being whether or not that business so conducted is interstate or intrastate commerce.

The Court finds the facts to be:

The complainant is the owner and operator of a gas pipe line extending from the gas fields near Monroe, Louisiana, through the states of Arkansas, Mississippi and into the State of Tennessee, near Memphis, the gas transported by it being purchased under a contract from the United Gas Pipe Line Company and the delivery of the gas to it is made at a station near Monroe, Louisiana. This gas is transported into pipe lines through the states of Louisiana, Arkansas, Mississippi and into Tennessee, and, at points along said line outside the State of Tennessee, delivery is made to certain customers which are public utility distributing companies, and in Tennessee is delivered to two purchasers, public utility distributing companies, one the Memphis Power & Light Company at Memphis, Tennessee, and the other the West Tennessee Power & Light Company, outside of Shelby County, Tennessee. The contracts for the purchase of gas by these two companies were entered into
[fol. 623] in the State of New York. Delivery of gas in the State of Tennessee is made at a station called The City Gate Meter Station, at which place the gas is withdrawn from the pipe line of complainant and moves in a continuous flow out of said pipe line and into the distributing pipe lines of the two public utility distributing company customers, who in turn serve many local consumers.

Part of the gas delivered to the Memphis Power & Light Company in the City Gate Meter Station, is transported by

it through its own pipe line to its electric generating stations where it is consumed in the operation of a generating plant by said company, and the remainder is sold by it to local customers.

The complainant does not own or operate any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Said gas does not come to rest in the State of Tennessee, but passes in a continuous flow into the pipe lines of complainant's two Tennessee customers.

The complainant company does not operate or maintain any equipment of any kind used in the distribution of gas in Tennessee, nor does it have any ownership or control of said gas after it is delivered, as above stated, into the distributing lines of the public utility distributing companies. [fol. 624] The complainant sells gas under contracts with the two public utility distributing companies in Tennessee, and its relation with them is that of buyer and seller, and such has been its relation during the years in question here.

The complainant maintains an office in Memphis, Tennessee, and the business transacted at this office during the years in question was exclusively the operation and management of the company's pipe line referred to. The Court therefore finds that under these circumstances the business conducted by the complainant company is wholly interstate commerce and therefore exempted by the express provisions of Section 1316 of the Tennessee Code which excludes earnings arising from interstate commerce.

It is contended by the defendants that the contract between the complainant and the public utility distributing companies constitutes them partners in business and that for this reason the complainant is engaged in intrastate business.

From a careful examination of the contract in question the Court is satisfied that these public utility companies are the buyers of gas from the complainant company, and that the arrangements made as to the price to be paid for [fol. 625] the gas delivered does not change or affect the nature of the complainant's operations in the State of Tennessee.

It is insisted by the defendants that because the complainant filed its charter with the Secretary of State that this is an admission that it is engaged in intrastate business. This does not necessarily follow. Many corporations have charters filed in the State of Tennessee under which they may be

authorized to engage in a certain character of business, but do not do so, and the tax in this case is based upon the business *done* in the State of Tennessee as a matter of fact. It is also insisted by the defendants that the complainant company is an integral part of the Electric Bond and Share group of corporations and so interlocked with the corporation in Louisiana from which it purchases its gas, and the corporate purchasers from it in Tennessee, that they are component parts of the same enterprise and therefore liable for the tax. After a careful examination of all the proof and the entire record, the Court is of opinion that this contention of the defendants is not established. The Electric Bond and Share group of corporations do not dominate and control the complainant corporation and the complainant's dealings with the defendants distributing companies has been by contract entered into after much discussion and [fol. 626] some delay, which constitute these distributing corporations buyers of gas from the complainant company in the ordinary course of trade, and not by reason of any dominating influence of a holding company.

The Court having concluded from the facts and the law that all of the earnings of the complainant company in the operation of its pipe line business during the years in question, were delivered from interstate commerce, such earnings being expressly excluded by the terms of the sections of the Code hereinabove referred to, the complainant is not liable for said excise tax and the temporary injunction heretofore granted should be made permanent.

Decree accordingly.

R. B. C. Howell, Chancellor, Part One Seventh Chancery Division, Nashville, Tennessee.

March 1, 1940.

[fol. 627] In Chancery Court of Davidson County

No. 53369 R. D.

Memphis Natural Gas Company

v.

Lewis S. Pope, et al.

Final Decree—March 8, 1940

This cause came on this day to be heard on the original bill and petition for declaration of rights and for injunctive

relief filed by complainant, amendment to said original bill, the answers of defendants, stipulations of the parties and all exhibits thereto, depositions and all exhibits thereto filed herein, the entire record in this cause, and argument of counsel, from a consideration of all of which the court finds, orders and adjudges, as shown by memorandum filed herein and made a part of the record that:

[fol. 628] The record in this cause presents a mixed question of law and fact growing out of the claim by the defendants, officials of the State, that the complainant is liable for an assessment for excise taxes for the years 1932 to 1935, inclusive, amounting to about $60,000.00

It is the contention of the complainant that it is engaged solely and exclusively in interstate commerce and that all of its earnings during the years in question arose entirely from interstate business, which is especially excluded from the provisions of the excise tax law, while the defendants claim that the business done by the complainant, or at least a part thereof, is intrastate commerce, and therefore the complainant is liable for excise taxes for the years in question.

There is very little if any, conflict in the testimony as to the actual business transacted by the complainant, the controversy in this regard being whether or not that business so conducted is interstate or intrastate commerce.

The Court finds the facts to be:

The complainant is the owner and operator of a gas pipe line extending from the gas fields near Monroe, Louisiana, [fol. 629] through the states of Arkansas, Mississippi and into the State of Tennessee, near Memphis, the gas transported by it being purchased under a contract from the United Gas Pipe Line Company and the delivery of the gas to it is made at a station near Monroe, Louisiana. This gas is transported into pipe lines through the states of Louisiana, Arkansas, Mississippi and into Tennessee, and, at points along said line outside the State of Tennessee, delivery is made to certain customers which are public utility distributing companies, and in Tennessee is delivered to two purchasers, public utility distributing companies, one the Memphis Power & Light Company at Memphis, Tennessee, and the other the West Tennessee Power & Light Company, outside of Shelby County, Tennessee. The contracts

for the purchase of gas by these two companies were entered into in the State of New York. Delivery of gas in the State of Tennessee is made at a station called The City Gate Meter Station, at which place the gas is withdrawn from the pipe line of complainant and moves in a continuous flow out of said pipe line and into the distributing pipe lines of the two public utility distributing company customers, who in turn, serve many local consumers.

Part of the gas delivered to the Memphis Power & Light Company in the City Gate Meter Station, is transported by it through its own pipe line to its electric generating sta- [fol. 630] tions where it is consumed in the operation of a generating plant by said company, and the remainder is sold by it to local customers.

The complainant does not own or operate any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Said gas does not come to rest in the State of Tennessee, but passes in a continuous flow into the pipe lines of complainant's two Tennessee customers.

The complainant company does not operate or maintain any equipment of any kind used in the distribution of gas in Tennessee, nor does it have any ownership or control of said gas after it is delivered, as above stated, into the distributing lines of the public utility distributing companies.

The complainant sells gas under contracts with the two public utility distributing companies in Tennessee, and its relation with them is that of buyer and seller, and such has been its relation during the years in question here.

The complainant maintains an office in Memphis, Tennessee, and the business transacted at this office during the years in question was exclusively the operation and management of the company's pipe line referred to. The Court [fol. 631] therefore finds that under these circumstances the business conducted by the complainant company is wholly interstate commerce and therefore exempted by the express provisions of Section 1316 of the Tennessee Code which excludes earnings arising from interstate commerce.

It is contended by the defendants that the contract between the complainant and the public utility distributing companies constitutes them partners in business and that for this reason the complainant is engaged in intrastate business.

From a careful examination of the contract in question the Court is satisfied that these public utility companies are

the buyers of gas from the complainant company, and that the arrangements made as to the price to be paid for the gas delivered does not change or affect the nature of the complainant's operations in the State of Tennessee.

It is insisted by the defendants that because the complainant filed its charter with the Secretary of State that this is an admission that it is engaged in intrastate business. This does not necessarily follow. Many corporations have charters filed in the State of Tennessee under which they may be authorized to engage in a certain character of business, but do not do so, and the tax in this case is based upon [fol. 632] the business *done* in the State of Tennessee as a matter of fact. It is also insisted by the defendants that the complainant company is an integral part of the Electric Bond and Share group of corporations and so interlocked with the corporation in Louisiana from which it purchases its gas, and the corporate purchasers from it in Tennessee, that they are component parts of the same enterprise and therefore liable for the tax. After a careful examination of all the proof and the entire record, the Court is of the opinion that this contention of the defendants is not established. The Electric Bond and Share group of corporations do not dominate and control the complainant corporation and the complainant's dealings with the distributing companies has been by contract entered into after much discussion and some delay, which constitute these distributing corporations buyers of gas from the complainant company in the ordinary course of trade, and not by reason of any dominating influence of a holding company.

The Court having concluded from the facts and the law that all of the earnings of the complainant company in the operation of its pipe line business during the years in question, were derived from interstate commerce, such earnings being expressly excluded by the terms of the sections of the Code hereinabove referred to, the complainant is not liable [fol. 633] for said excise tax and the temporary injunction heretofore granted should be made permanent.

It is further Ordered, Adjudged and Decreed by the Court:

(1) All earnings of the complainant, Memphis Natural Gas Company, in the operation of its pipe line business during the years 1932 to 1935, both inclusive, in the State of Tennessee arose from interstate commerce.

(2) Complainant, Memphis Natural Gas Company, is not liable for any excise tax imposed by Sections 1316-1318, inclusive, Tennessee Code 1932, for the years 1932 to 1935, both inclusive, earnings from interstate commerce being expressly excluded by the terms of said sections of the Tennessee Code of 1932.

(3) The temporary injunction heretofore granted restraining and enjoining Lewis S. Pope, Lawyer and Special investigator, George McCanless, Commissioner of Finance and Taxation, who was substituted by stipulation for Walter Stokes, Jr., former Commissioner of Finance and Taxation, and Roy H. Beeler, Attorney General, and each of them, their successors, employees, associates, agents and at-
[fol. 634] torneys, from enforcing or attempting to enforce, by distraint, or in any other way or manner, the assessment, levy and collection of excise taxes under Sections 1316-1318, inclusive, Tennessee 1932 Code, against complainant, Memphis Natural Gas Company, for the years 1932 to 1935, both inclusive, be and the same is hereby continued and made permanent and perpetual.

It is further ordered and decreed that the defendants pay the costs of this cause; and it appearing to the Court that the State of Tennessee is the real party defendant the costs are adjudged against it and the Clerk and Master is directed to collect said costs in the manner provided by statute in such cases.

To all of which action of the Court the defendants except and pray an appeal to the present term of the Supreme Court at Nashville which is granted and the State of Tennessee being the appealing party no bond is required.

It is furtner ordered by the Court that all exhibits filed herein to the testimony, be sent up with the record by the Clerk and Master in their original form and not copied in the transcript.

[fol. 635] IN CHANCERY COURT OF DAVIDSON COUNTY

[Title omitted]

ORDER OVERRULING OBJECTIONS TO EVIDENCE—March 13, 1940

In this cause it is ordered that all the objections made by the complainant as to the competency and admissibility of

the evidence offered on behalf of the defendants be and the same are overruled. To this action of the Court, the complainant excepts.

This order is entered on March 13, 1940, for March 8, 1940.

[fols. 636-638] CERTIFICATE OF CLERK AND MASTER

STATE OF TENNESSEE,
County of Davidson:

I, J. C. Dale, Jr., Clerk and Master of the Chancery Court at Nashville, do hereby certify that the foregoing (consisting of two volumes) is a full, true and perfect copy of the papers and proceedings except original exhibits had in the cause wherein Memphis Natural Gas Company is Complainant, and Lewis S. Pope, et al., are Defendants, as the same appear of record and now on file in my office.

All exhibits are sent up with transcript in original form, except exhibits to depositions of Henry C. Wallace, Birger L. Johnson and Milton S. Binswanger which are contained in Volume III, sent up herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of said Court, at my office in the Court House at Nashville, this the 30th day of March, 1940, and the 164th year of American Independence.

J. C. Dale, Jr., Clerk & Master. (Seal.)

[fol. 639] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR OF ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, LEWIS S. POPE, LAWYER AND INVESTIGATOR, AND GEORGE F. MCCANLESS, COMMISSIONER OF FINANCE AND TAXATION

I

The Court erred in granting the temporary injunction and in making it permanent. (Tr. p. 453.) The bill was filed by a taxpayer and sought to restrain the collection of state revenue. (Tr. p. 17.) The injunction violated Sec. 1795 of the Code of Tennessee (1932).

II

The Court erred in finding and decreeing that complainant was engaged in business in Tennessee solely in interstate commerce. (Tr. p. 451.) The complainant was engaged in the local, intrastate business of supplying natural gas to consumers in Tennessee, on demand. (Tr. p. 19.) This was exercising a corporate function in Tennessee, which was taxable under Sections 1316 et seq. of the Code of Tennessee (1932). The earnings arising from this business were earnings arising from intrastate commerce and were properly used as a measure of tax liability.

III

The Court erred in finding and decreeing that complainant was engaged in business in Tennessee solely in interstate commerce. (Tr. p. 451.) The complainant, in association or partnership with the Memphis Power & Light Co., was engaged in the local, intrastate business of distributing [fol. 640] gas in the city of Memphis and Shelby county, Tennessee (Tr. 18-292). The earnings thus arising came from business done wholly within the state of Tennessee and excluding interstate commerce and were properly used as a measure of tax liability of complainant for exercising corporate functions in this state. (Sec. 1316 et seq., Code of Tennessee, 1932.)

IV

The Court erred in finding and decreeing that complainant was engaged in business in Tennessee solely in interstate commerce. (Tr. p. 451.) The complainant filed its charter with the Secretary of State of the State of Tennessee, and paid the filing fees to become a domesticated foreign corporation qualified to carry on intrastate commerce. (Tr. p. 284.) The complainant thereby enjoyed certain privileges, franchises and immunities not conferred on interstate corporations by the State of Tennessee, including the right to eminent domain.

Complainant maintained its principal office in Memphis and did all of its business in that office—it controlled and managed its entire gas business, made all collections and disbursements from that office, carried its bank account in Memphis, loaned and borrowed money there, and made investments there.

After so qualifying and doing all of its business in Tennessee, and securing the right to trade in the market af- [fol. 641] forded and protected by Tennessee, the complainant was estopped to deny that it was engaged in business in Tennessee.

V

The Court erred in finding and decreeing that complainant was engaged in business in Tennessee solely in interstate commerce, (Tr. p. 451.) The complainant was engaged in business in this state, as a component part of Electric Bond and Share Company, in association with the Memphis Power & Light Co., a wholly owned, dominated and controlled subsidiary of Electric Bond and Share Company. (Tr. p. 396.) As such part of Electric Bond and Share Company, the complainant received all of the earnings used as a measure of tax in this case which all, accordingly, arose from business done wholly within this state and excluding interstate commerce.

VI

The Court erred in sustaining the original bill, granting the relief sought, and making the injunction permanent. (Tr. p. 453.) The complainant was liable for all or part of the revenue sought to be collected and the injunction was, therefore, illegal.

[fol. 641-a] In Supreme Court of Tennessee

Portions of Printed Brief of Memphis Natural Gas Co.

II

A state can not lay a tax on interstate commerce in any form—whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on.

Ozark Pipe Line Corp. vs. Monier, 266 U. S. 555, 69 L. ed. 439 Paper Book p. 4 (1925).

Missouri ex rel. Barrett vs. Kansas Natural Gas Co., 265 U. S. 298, 68 L. ed. 1027 Paper Book p. 10 (1924).

LeLoup vs. Mobile, 127 U. S. 640, 32 L. ed. 311 (1888).

Kansas City, etc., vs. Botkin, 240 U. S. 227, 60 L. ed. 617 (1916).

Pennsylvania vs. West Virginia, 262 U. S. 553, 67 L. ed. 1117 (1923).

III

During the years 1932 to 1935, both inclusive, the operation of complainant's pipe line and of complainant's business in the State of Tennessee was exclusively in interstate commerce and all of complainant's earnings were derived from interstate commerce and hence beyond the power of the state to lay an indirect privilege tax upon complainant.

State Tax Commission of Mississippi vs. Interstate Natural Gas Co., 284 U. S. 41, 76 L. ed. 156 Paper Book p. 2 (1931).

Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. ed. 227 Paper Book p. 13 (1921).

Public Utilities Commission of Kansas vs. Landon, 249 U. S. 236, 63 L. ed. 577 (1919).

Missouri ex rel. Barrett vs. Kansas Natural Gas Co., 265 U. S. 298, 68 L. ed. 1027 Paper Book p. 10 (1924).

East Ohio Gas Co. vs. Tax Commission of Ohio, 283 U. S. 465, 75 L. ed. 1171 Paper Book p. 19 (1931).

Ozark Pipe Line Corp. vs. Monier, 266 U. S. 555, 69 L. ed. 439 Paper Book p. 4 (1925).

Quicksafe Mfg. Co. vs. Graham, 161 Tenn. 46 (1930).

[fol. 641-b]

IV

The fact that complainant maintained in Tennessee an office in which was transacted business incident to interstate commerce is immaterial. Inasmuch as all of its earnings came from interstate commerce they were always within the exemption of the statute.

Heyman vs. Hays, 236 U. S. 178, 59 L. ed. 527 (1915).

Ozark Pipe Line Co. vs. Monier, 266 U. S. 555, 69 L. ed. 439 (1925).

Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218, 77 L. ed. 710 (1933).

Lumber Co. vs. Moore, 126 Tenn. 313 (1912).

Federal Coal Co. vs. U. S. Fuel Corp., 147 Tenn. 212 (1922).

Quicksafe Manufacturing Co. vs. Graham, 161 Tenn. 46 (1930).

Goolson vs. Wickwire Spencer Sales Corp., 66 S. W. (2d) 814 (1933).

[fol. 641-c] The Construction or Application of Sections 1316 to 1318 of the Tennessee Code of 1932 so as to Exact from Complainant the Excise Tax Provided for by these Sections would "Constitute a Violation of Complainant's Rights as Guaranteed to Complainant under Article 1, Section 8, Clause 3 of the Constitution of the United States, in that

(a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.

(b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.

(c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.

(d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States."

The quoted part of the above sub-heading is from complainant's original bill (R. pp. 11, 12), in which complainant claims its rights under the Constitution of the United States. The Chancellor did not find it necessary to go into this constitutional question because of the exclusion by the express terms of the statute of earnings derived from interstate commerce. Having found that all of complainant's earnings were derived from interstate commerce, it was [fol. 641-d] only necessary for him to apply the statute in order to exclude them from the tax.

Our insistence now, however, is that any other construction or application of the statute would be a violation of complainant's constitutional rights and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States, which confers upon Congress the power to regulate interstate commerce. Therefore we here and now make that federal question and it is our submission that any other construction or application of the statute to the transactions here involved different from that made by the Chancellor would immediately bring the statute

as so construed and applied in conflict with the commerce clause of the Federal Constitution.

In this connection we point out that the cases which we have already cited and quoted from not only hold that similar transactions there involved were interstate commerce, but were interstate commerce of such nature as to be immune to the tax there involved under Article 1, Section 8, Clause 3 of the Constitution of the United States.

Therefore, again we cite these cases in support of our contention that not only are complainant's earnings exempt from the excise tax provided for, by sections 1316 to 1318, Tennessee Code of 1932, but that they are protected from any such tax by that provision of the Federal Constitution.

Our insistence is that not only has the state expressly refrained from taxing interstate commerce, but that it [fol. 641-e] does not possess the power to impose a tax upon the business in which the complainant was engaged in the years 1932 to 1935, and that if either this statute or any other statute had taxed the business of complainant during those years, as is now attempted to tax it, such a statute and its application would have been unconstitutional.

State Tax Commission vs. Interstate Natural Gas Company, 284 U. S. 41, 76 L. ed. 156 (1931), Paper Book p. 2;

Pennsylvania vs. West Virginia, 262 U. S. 553, 67 L. ed. 1117 (1923);

Missouri, ex rel. Barrett, vs. Kansas Natural Gas Company, 265 U. S. 298, 68 L. ed. 1027 (1924), Paper Book p. 10;

Public Utilities Commission vs. Landon, 249 U. S. 236, 63 L. ed. 577 (1919);

Eureka Pipe Line Company vs. Hallanan, 257 U. S. 265, 66 L. ed. 227 (1921), Paper Book p. 13;

East Ohio Gas Co. vs. Tax Commission, 283 U. S. 465, 75 L. ed. 1171 (1931), Paper Book p. 19.

We do not elaborate upon this argument because of the full quotations already made from the cases and because we believe we are clearly entitled to prevail under the express terms of the Tennessee statute. But, we earnestly make the insistence because we want it distinctly to appear that this right so claimed under the Federal Constitution is strongly insisted upon.

[fol. 642] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

OPINION—Filed May 17, 1941

The complainant, a Delaware corporation, domesticated in Tennessee with its chief place of business in Memphis, Tennessee, filed the bill against certain officials and tax collectors of the State of Tennessee to enjoin the collection of excise taxes for the years 1932 to 1936 and for a declaration of rights, status and legal relations. An injunction was obtained to prevent the levies by distress proceedings.

The excise tax is that provided by 1932 Code, sec. 1316 et seq. It is alleged that the assessments are in violation of constitutional rights, asserting that the taxes are on the right to do business which is exclusively interstate commerce.

[fol. 643] The bill was sustained by the chancellor and the injunction made permanent.

Upon appeal and proper assignments of error, extensive briefs and argument, the case is here. The essential facts which are presented by evidence supported by the pleadings are as follows:

The Memphis Natural Gas Company was promoted and organized in 1928 and it and Memphis Power & Light Co., were associated together by contract in furnishing natural gas brought from the gas fields at Monroe, Louisiana, into the State of Tennessee. Complainant brings the gas in pipe lines, the entire line with its branches in Tennessee extending 370.5 miles in length. Complainant has a contract with Memphis Power & Light Co., to distribute the gas to consumers in Shelby County, Tennessee, and with West Tennessee Power & Light Co., which distributes the gas to other places in West Tennessee.

The excise taxes for the years 1932-1936, both inclusive, enjoined, amounted to $57,156.83. Since the bill was filed

the taxes for 1936 were withdrawn from the litigation by the defendants.

There are compressor stations along the transportation line at intervals to force the flow of gas. Complainant furnishes one buyer in Arkansas, the Arkansas Power and Light Company, and none in Mississippi.

[fol. 644] The gas is delivered to Memphis Power & Light Co., at Brooks Avenue in Memphis, and nine other stations in Shelby County, with measuring meters at each. The gas is measured by the cubic foot, or, in thousands of cubic feet. The meter instruments act by means of recorded pressure on charts.

The deliveries to West Tennessee Power & Light Company are at seven points by like measures of gas flow. By contract with West Tennessee Power & Light Co., complainant extended its pipe line at its own expense for purposes of delivery by main lines and laterals from Memphis to the towns of Covington, Brownsville, Ripley, Jackson and Humboldt in West Tennessee, and these lateral lines are owned and operated by complainant.

The flow from the fields in Louisiana is continuous until delivered at these stations. There is an attempt to obtain a constant pressure along the main pipe line at a much higher pressure than can be used in the distribution lines.

At these meter stations, where the gas is delivered by Memphis Natural Gas Company to the distributing corporations, an attempt is made by Memphis Natural Gas Company to obtain a constant pressure in order that the gas may be measured, and an apparatus is used to reduce the pressure as it enters the distribution systems. To do this it is necessary to keep in touch with the requirements of [fol. 645] the various markets from hour to hour, and men are kept on the operations for this purpose. The stations are so operated to suit the conditions that prevail at any time. During certain hours of use, the load is diminished more rapidly and a regulator machine is used to control pressure.

Complainant uses a private telephone line extending the length of the pipe lines and a dispatcher is kept at Memphis to control the input of gas and to report troubles. Line walkers and repair crews keep up the lines.

The books and records of Memphis Natural Gas Company are kept at Memphis in its main office, and its entire business is conducted from Memphis as its general head-

quarters. It owns its own pipe lines and purchase the gas from a producing company. The President of Memphis Natural Gas Company lives in Memphis. The offices consist of eight rooms, and approximately twelve people are employed in the offices.

The distributing lines and appliances for sale and distribution belong to Memphis Power and Light Company. Each of these companies employs its own men and makes its own purchases of materials.

The percent of revenues of Memphis Natural Gas Company derived from Memphis Power and Light Company, to its total revenues, was:

[fol. 646]	1932	83.24%
	1933	83.08%
	1934	81.47%
	1935	80.06%

So that the bulk of all complainant's revenues from every source is derived from its business done with and through Memphis Power and Light Company.

These two corporations cooperated jointly in the scheme of bringing natural gas into Memphis and distributing it to the consuming public. For this purpose and coincidentally a franchise was obtained from the City of Memphis. This franchise runs in the name of Memphis Power and Light Company. However, at the same time, the contract hereinafter set forth was executed by and between Memphis Natural Gas Company and Memphis Power and Light Company and this contract was filed with the City as a part of the contract with the City by which the twenty-five year franchise was granted. A provision in the contract, which materially affects the obligations to the City of Memphis, representing the public and affecting the material rights of both these companies financially, will be referred to and explained later. The case, as we view it, largely turns upon the contract between these two companies, and with the City. This contract between the two companies is named a contract of bargain and sale. Mem- [fol. 647] phis Natural Gas Company is called Seller and Memphis Power and Light Company is called Buyer; and it is argued that by its terms, Seller sells to Buyer all the gas it will need. The contract is complicated and long. A study of it leaves one with an impression that there was

a studied effort to cover up a pooling of interests with the varnish of a sale. To understand it there is required more than surface inspection of the varnish. We must look through the gloss finish and see what is underneath.

It is argued by counsel for complainant that there is a sale of gas at a fixed price, subject to future adjustment; and that the gas is delivered to the Buyer in direct flow of interstate commerce. Counsel for defendants contend that the provision for sale at a stipulated price is but part of a scheme of partnership in which the so-called Seller is a partner with the Buyer and engaged with it in the sale and distribution of gas to local consumers and that each party is interested in the business conducted by the other.

At the present time, under the uniform Partnership Act in Tennessee, the word person includes Corporations; and in the provisions defining partnerships the word person is used in such way as to indicate that a corporation may be a partner. Code 7841, 7845.

[fol. 648] The sharing by a person of profits of a business is prima facie evidence he is a partner in the business. Code 7846.

But, whether a corporation can technically become a partner, or whether it requires charter authority to become a partner, a corporation can make contracts in pursuance of its corporate powers that will bind it in joint adventures or undertakings. And, even without joint control of the operations that produce profits, persons or corporations may establish relationships that will result in a sharing of profits, each with the other. There is no law against two public utilities engaged in supplying gas to a community to so divide or parcel their work as to give each a separate management of a portion and then pool their earnings, regardless of the technical rules of partnership. The right to contract is free enough to include such an arrangement, and there is no vice in it.

One may be an agent of the other in details, but activities do not have to be classified to make them lawful.

In this contract of May 24, 1928, which was executed between Memphis Natural Gas Company and Memphis Power and Light Company, and presented to the City of Memphis to induce the City to grant the franchise, it was stipu-
[fol. 649] lated that the Seller agrees to sell and the Buyer agrees to buy, take and pay for such amounts of natural gas as may be requisite to fulfill all contracts for sale; and

second, for the use by the Buyer for its electric generating plant.

By the Fifth Article, the Seller was to furnish, install, operate and maintain at its own expense a regulating and measuring station and meter the gas with certain temperature and specific gravity tests.

By the Sixth Article subject to adjustment provisions in Article Eleventh, certain graduated prices or rates, according to the class of use, were named.

By the Ninth Article, briefly stated, the Seller was monthly to deliver to Buyer and to the City of Memphis, a statement setting forth in reasonable detail:

1. Sellers investment, including cost of pipe lines, installations, etc.

2. Gross revenues from sale of gas to Seller.

3. All costs of maintaining and operating.

4. Costs of renewals, replacements, etc.

5. Amount necessary for a fifteen year 6% sinking fund [fol. 650] to amortize Seller's investment.

6. All taxes.

7. Six per cent at the end of each year of Seller's investment for extraordinary maintenance, renewals, replacements or amortization.

8. Net surplus or net deficit of Seller for the contract year.

By the Tenth Article, Buyer was to deliver, yearly, to Seller and to the City of Memphis, the same information of its affairs and operations as those required of Seller, listed above.

The Eleventh Article is lengthy, but its importance warrants its copy in full as follows:

"Eleventh: It is understood and agreed by the parties hereto that the amount of the combined net surpluses or combined net deficits of the Buyer and the Seller for each contract year, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall (until after the provisions of the next succeeding paragraph shall have become operative) be equally divided between the Buyer and the [fol. 651] Seller by a cash adjustment to be made each year

as soon as possible after the rendering of the statements provided for in Articles Ninth and Tenth hereof, and at the same time the parties shall agree upon such adjustments, if any, in the rates set forth in Article Sixth hereof as may be calculated to be necessary in order as nearly as possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years.

If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the [fol. 652] combined net surplus for such contract year shall be paid to or retained by the Seller and thereafter no further changes in the rates set forth in Article Sixth hereof (or in such rates as theretofore adjusted under the foregoing provisions of this Article Eleventh) shall be made except such changes in such rates, if any, as may be required under the provisions of the next succeeding paragraph of this Article Eleventh. In all subsequent contract years, the entire balance of the Buyer's net surplus for each subsequent contract year over and above an amount equal to one and one-half per cent of the amount of the Buyer's investment shown under (7) of the statement rendered under Article Tenth for such subsequent contract year shall be paid to the Seller.

In each and every contract year during the continuance of this agreement or any extension thereof after (A) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under [fol. 653] Article Ninth and Tenth hereof, shall have been made up and (B) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, and (C) in addition thereto, the Seller shall have re-

ceived from the combined net surpluses, as shown by such statement, net earnings affording it a reasonable return in view of the hazards of the undertaking of the Seller at the inception thereof, upon the respective amounts of the Seller's investment shown under (7) of the statements rendered under Article Ninth for all contract years up to such time, then the Seller and the Buyer agree to and will cooperate to bring about a reduction in the rates to be charged by the Buyer to its customers in the following manner:

1. The parties shall agree upon such adjustment in the [fol. 654] rates set forth in Article Sixth hereof (or in such rates as theretofore adjusted under this Article Eleventh) as may be calculated to be necessary in order as nearly as possible to reduce the operating expenses of the Buyer in subsequent contract years by an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph, and

2. The Buyer shall then reduce its rates to its consumers in such amount as may be calculated to be necessary in order as nearly as possible to effect a reduction in the gross revenues of the Buyer for ensuing contract years in an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this para- [fol. 655] graph. It is agreed that such reduction of rates by the Buyer pursuant to the provisions of this paragraph of this Article Eleventh, shall be applied first toward lowering the price of gas to domestic consumers.

Each party shall have the right to examine the books, records, vouchers, and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or adjustment made pursuant to the provisions of any Article hereof. If such examination reveals any inaccuracy in the statements, charges, or adjustments theretofore made, the necessary adjustment shall be promptly made.

The City of Memphis shall have the right by a reputable firm of certified public accountants or engineers, appointed by resolution of the City Commissioners, to examine the books and accounts of the parties hereto to the extent necessary to verify the accuracy of any statement or adjustment made under or pursuant to the provisions of said Articles

Ninth, Tenth or Eleventh. If such examination reveals any inaccuracy in the statements or adjustments theretofore [fol. 656] made, the necessary adjustments shall be promptly made."

There is filed a copy of the franchise granted by the City of Memphis to the Memphis Power and Light Company until January 1st, 1958. This franchise shows that the contract between the pipe line corporation and the grantee is filed with the City and contemplates the cooperation of the two concerns, and provides a scale of rates to the consumers for gas. It is in this way indicated that the City is a contracting party with both these utility corporations.

The City of Memphis is a party to the contract in that, if Memphis Natural Gas Company realizes the net profits provided for on its investment from the inception of the enterprise, there is an adjustment of rates and the gas rate is reduced down to take up that excess profit. Thus we see complainant is dealing with the public in Memphis, represented by the City of Memphis.

The entire setup and the whole contract between the two Companies and the public shows a joint understanding. Mr. Johnson, President of the complainant company, in cross-examination, was asked by Mr. Pope, a hypothetical question as follows:

[fol. 657] "Suppose on the 10th day of January, 1935, the Memphis Power and Light Company had made enough profits on its business to have complied with all these conditions in here: that is, 6% we will say, the reasonable return to them, the same amount to you, and suppose they would have had $50,000 left over and above that, and after they had realized one and one-half per cent on their investment, what would have become of the $50,000 under this contract?"

After much pressure by the attorney and much evasion by the witness, driving at the making and disposition of the supposed $50,000, witness said:

"I would not say it is made by the Memphis Power and Light Company."

Q. by Mr. Pope: "Who is it made by?"

Answer: "It is made by both of us."

The witness admitted the fallacy of his own position when he said such supposed $50,000 of net earnings had been

made by both companies; and he finally was forced to admit that such supposed net balance would go under section Eleventh to the pipe line company. That resulted under [fol. 658] the following provision in section 11 of the contract:

"If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the Seller. * * *"

It will be seen that by the above provision, not only is "seller" a participant in the profits of the distribution of gas in Shelby County by the Memphis Power and Light Company, but after a certain situation is reached the "Seller" would receive all the remaining profits of the distribution.

[fol. 659] It is not necessary to determine when title to the gas passed to Memphis Power and Light Company, or whether title ever actually passed. If title passed, then, still the business conducted in distributing to consumers was for and on behalf of both these development and operating corporations, and Memphis Natural Gas Company was engaged through its co-operative in intrastate business in Tennessee.

The price of gas, if there ever was an actual sale, was not and could not be determined until after the gas had been delivered to the ultimate consumer. Our view is, that there is not a fixed price in Article Sixth which is merely adjusted by Article Eleventh, but in reality there was an operation in which both companies were jointly interested. There was an allotment of work performed but a division of the entire results of that work.

Whether the scheme of separate corporate entity, but joint profit, was designed in the beginning for purposes of economy, safety in business and to escape taxation, is a matter which may very reasonably be concluded.

There seems to be separate corporate entity, as was found by the Chancellor. This does not preclude a conclusion that [fol. 660] these gas companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and that the whole business is so intertwined as to make their business joint. The business done in Tennessee by complainant with the West Tennessee Power and Light Company amounted to approximately one or two (1%—2%) per cent during the years in question.

The business done with Memphis Power and Light Company for its generating plant bore the following proportion to its total business with that company:

1932	33.49%
1933	33.22%
1934	27.78%
1935	24.34%

This gas furnished to the electric generating plant was on a straight buyer and seller contract basis to furnish gas on demand. This contract was separate from the distribution contract hereinbefore discussed, but was to take effect contingent on that one being executed.

It is improper to look alone to Article Sixth, which ostensibly shows a sale, but the whole arrangement must be seen. In illustrating a unit composed of many parts, the great Apostle spoke of the human body as being many members [fol. 661] in one body. He said: "The eye cannot say unto the hand, I have no need of thee." This philosophy is the modern doctrine of construction.

Considering what is interstate commerce, the technical considerations of when things come to rest, or continuity of flow; of original package or the breaking up, and the like, are not the last word. In the whole field of law we find first, technical measurements, and then come practical considerations. Once we looked to controlling phrases, then later the four corners of the instrument. These are the processes of evolution in the law.

In the instant case we take Article Sixth for what it is worth and for what it was intended. It is a mathematical formula inserted to help in the measurement of profits, to be divided when complainant is given credit for the prices therein mentioned as applied to the various uses to be made of the gas; and Memphis Power and Light Company is

given credit for the sales to the various users of gas and the upkeep and amortization of invested capital is counted; and a certain stipulated profit is calculated, then the profits are divided from the entire enterprise.

[fol. 662] We are not to be deceived by subtle arguments over passages considered singly. The whole field of the enterprise must be seen to comprehend it. It is considerably like two partners, one to buy and haul in, another to sell, with two bank accounts and two sets of books, and at the end of each year a division of profits. The buying partner turns in the goods at certain prices, but these prices are just figures. In the end there is a division. They are both merchants in the same enterprise.

There is testimony from which defendants say there is a union between these utility corporations. It is insisted from the evidence that Memphis Power and Light Company and West Tennessee Power and Light Company are registered subsidiaries of the National Power and Light Company, it being a subsidiary of Electric Bond and Share Company, owning 99.9% of the voting stock of Memphis Power and Light Company and 100% of the stock of West Tennessee Power and Light Company. Also, that complainant is a part of the Electric Bond and Share Company group, by ownership of an interest in its stock.

The case of Lone Star Gas Company vs. Texas, 304 U. S. 224, 82 L. ed. 1304 and other cases are cited, which hold that if a corporation sells gas in a State to associations or [fol. 663] corporations having the same parent holding company, the business is intrastate commerce. There is exception to the competency of this evidence on the ground that the experts obtained their information from Moody's Manual and is therefore hearsay. Assignment of error is made by complainant on this appeal to the ruling of the chancellor admitting this evidence. We do not pass upon this evidence or its effect. The authorities so holding that such a combination is incompatible with the idea of interstate commerce is equal authority for a denial of the claim where the unity between the parties is a contractual bond.

Affiliated companies cannot be more effectually united than those bound together by bonds of joint adventure. The bond here is like the union of the Siamese twins. There are separate hands and feet and heads, but a union of the two bodies. That bond is the contract. The hands on one side bring in, and on the other distribute. Twin A gets half the

money; Twin B gets the other half up to a certain point, and then Twin A gets it all. Counsel for complainant has what he calls his "paper book." It contains the cases from West Publishing Company leaves, collecting the various cases considering interstate commerce in natural gas transportation. While the cases are unlike the instant one, we [fol. 664] are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to consumers by distribution or upon orders on demand, considering all its activities, it is intra-state business. This is true though the gas so furnished is drawn from interstate mains. Southern Natural Gas Corporation vs. Alabama, 301 U. S., 148.

Many of the facts in the above case are like those here. As here, the complaining company was bringing gas from the fields in Louisiana into Alabama, where it had contracts with four purchasers, three of which were intrastate utilities and one, the Tennessee Coal, Iron and Railroad Company, purchased gas for itself and affiliated companies. The complainant had a Delaware Charter but had domesticated in Alabama and had its chief office in Birmingham, where it conducted—as in this case—its entire business. It paid its annual required permit fee, as here. It constructed its lines reaching into Georgia. It possessed various items of property in Alabama, constituting its general transmission system. A majority of orders for gas were received by and cleared through the Birmingham office. All collections from sales were received and disbursements for expenses were made or authorized at that office. The sales to the Ten- [fol. 665] nessee company and its affiliates were made from time to time upon orders given at the Birmingham office, given as the needs of the purchaser required. The gas sold was delivered in continuous movement from the gas fields without break or interruption to the point where it was delivered, viz.; the meter house, where it was measured for the purpose of payment. The gas was moved under unregulated pressure. The pressure was reduced at the point of delivery for the accommodation of the purchaser to meet his requirements. The contracts with the companies contained provisions as to delivery, pressure, measurements, etc.

The measuring equipment belonged to Seller. In the contract with the Tennessee company the Seller provided at its

expense service lines at the Buyer's Bessemer plant and another plant, widely separated.

The main difference in the above case on the facts, to the facts here, consists in the Seller providing the service lines to the Tennessee company, and the further fact that there was no association between Seller and Buyer as in the instant case. We regard the instant case a stronger one to support the tax because of this joint enterprise feature. [fol. 666] Chief Justice Hughes wrote the opinion affirming the Alabama Supreme Court, in which it was said:

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana it appears that appellant carried on in Alabama activities of an intrastate character."

As in other more recent cases, the Supreme Court apparently treated it as a case problem on all its facts.

Complainant charges in the bill that the excise taxes for the years 1932 and 1933 are barred by the Statute of Limitations of three years, the due date for payment being July 1st, 1933, and July 1st, 1934.

The Statute pleaded is section 1487 of our Code. It is attached to authority for back assessing taxes upon property, and the limitation is: "but no taxes on property for more than three years back shall be assessed and collected where they have not been assessed and not paid in consequence of the errors or omissions of former collectors or assessors."

On its face this only applies to property taxes. Counsel [fol. 667] refer to an expression in Foppiano vs. Speed, 113 Tenn., 167, 173. The tax there involved was a tax imposed upon persons selling beer, or any quantities of liquor on steamboats or any other vessel or watercraft, or from railroad cars; and they were required to pay a tax in lieu of all other taxes of $200 per annum. The Court said:

"The limitation of three years is fixed in analogy to the limitation fixed upon other back taxes."

The tax in that case was to take the place of any property or other tax. The tax here is a corporation excise tax which

has no relation to property taxes. The tax here imposed is provided, not in the Article where the three year limitation is found, but in the Article on Excise Taxes—a different subject of taxation—which provides for a different system of collection by means of different officers therein designated. The collection is made by the Commissioner of Finance and Taxation. No limitation is provided by the Act.

There is a general limitation on collection of all taxes, of whatever nature, contained in Section 1494 of the Code; and fixes the time within six years. We think this six year limi-[fol. 668] tation is the one applicable here, and not the limitation of assessors and collectors by county officials to back assess property. The tax analogy is not sufficiently complete for a court to set up by judicial construction a limitation imposed in a special but different situation.

The decree of the chancellor is reversed, the injunction dissolved and the bill dismissed at complainant's cost.

Defendants may take a reference for damages as against the injunction bond for the wrongful suing out of the injunction.

Mr. Justice Chambliss dissents.

Frank T. Fancher, Special Judge.

[fol. 669] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE et al.

CONCURRING OPINION OF MR. JUSTICE MCKINNEY—Filed May 17, 1941

I concur in the conclusion announced in the majority opinion upon the ground that the involved tax can be sustained under the principles announced in Southern Nat. Gas. Corp. vs. Alabama, 301 U. S. 148, 81 L. ed. 970, and Atlantic L. Co. vs. Com'r. of Corp. and Taxn., 298 U. S. 553, 80 L. ed. 1328. In those cases the court, in distinguishing them from that of Ozark Pipe Line Corp. vs. Monier, 266 U. S. 555, 69 L. ed. 439, emphasized the fact that oil

was neither received nor delivered in Missouri, and indicated that had it been so received or delivered the result would have been different; and, as I interpret the opinion [fol. 670] in the Alabama Case, it makes no difference whether the delivery is to the consumer or distributor or to both.

In the instant cause, complainant piped the gas from Louisiana to Memphis, where, under one contract, a portion of it was turned into a smaller pipe and delivered to the municipality for consumption at its electric generating plant. Under another contract this gas was delivered to the municipality at three or four other stations in Shelby County for distribution to its patrons. By a third contract complainant delivered gas to the West Tennessee Power & Light Company at six stations throughout West Tennessee for distribution to its patrons. This gas is delivered in greatly reduced pressure from that in which it is piped in Memphis, and complainant operates pressure control stations in Shelby County, Tennessee, for that purpose. This gas flows into Memphis in an 18-inch pipe where it is broken up and distributed in pipes varying in diameter from 10 inches to 3 inches. This, under my interpretation of the decisions of the Supreme Court of the United States, is, so to speak, "a breaking of the original package," which, in connection with the other activities of complainant in Memphis and other sections of West Tennessee, constitutes "engaging in business in the state" so as to subject it to the tax.

McKinney, J.

[fol. 671] [File endorsement omitted.]

IN SUPREME COURT OF TENNESSEE

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE et al.

DISSENTING OPINION OF MR. JUSTICE CHAMBLISS—Filed May 17, 1941

I am constrained to dissent. It is clear and I think, in effect, recognized on the briefs of the State and in the

opinion of the majority, that the flow of the gas in question is continuous across State lines into Tennessee to the points of delivery, without having come previously to a stop, to (1) Memphis Power & Light Company and (2) West Tennessee Power & Light Company, intrastate distributors of the gas. As I understand the holding of liability is rested on the theory and finding that the interstate seller and shipper and the intrastate buyer and distributors are copartners, jointly interested in the business of gas distribution [fol. 672] to consumers locally, the parties operating under a profit sharing plan—and that, therefore, the tax applies to all of the product conveyed through its pipe lines into this State from its wells in Louisiana. (This liability is held to apply not only to the gas sold and delivered to the Memphis Power & Light Company, whose relations with the Memphis Natural Gas Company are construed to have the effect above stated, but extended to the gas sold and delivered to the West Tennessee Company also.)

While this theory is stated forcefully and plausibly, I am unable to accept it. At last, upon analysis, the arrangement between these Companies, conceded to be legally distinct corporate entities, held to constitute, in effect, a partnership, relates alone to the method and measure of the compensation which the interstate seller and shipper receives for its product from the interstate buyers and distributors.

No authority is cited for the adoption of the method or extent of payment by a buyer of goods shipped interstate, as a factor determining the taxability of the product. The opinion of Hughes, C. J., in Southern Natural Gas Corporation vs. Alabama, 301 U. S., 148, cited and quoted from in the majority opinion, does not adopt or discuss this theory of partnership profit sharing, or joint enterprise. Liability was predicated in this case on a finding that the Gas [fol. 673] Company *itself*, not through another, "carried on in Alabama activities of an intrastate character,"—taking orders and making sales and maintaining service stations to various sundry consumers, etc. The majority opinion concedes that in that case "there was no association between seller and buyer."

Not only do I find no case where such an "association" of the buyer and seller has been dealt with, but I am impressed that the opinion of Mr. Justice Cardozo in People, ex rel. Pa. Gas Co. vs. Saxe, et al., 229 N. Y., 446, announces the correct principle to the effect that the liability for taxes

to a state on goods shipped into a state, does not turn on, and is not to be determined by, the amount, measure or method of compensation; and that a plan of payment under which the amount of compensation is determined by the profits earned by the buyer distributing the product does not deprive the interstate seller of the exemption inuring under the commerce clause. In that case the compensation of the interstate shipping Company was based on the gross receipts of the local distributor. The contracts were what is known as "requirement" contracts, that is, the amount delivered was determined by the requirements from time to time of the distributors. Cardozo, J., writing the opinion for the Court, said, "We think the interstate character of the relator's business is untouched by these arrangements." Further, "the sale does not cease to be one in interstate commerce because the price is to be measured by the pur- [fol. 674] chaser's receipts." I think the arrangement in the instant case was a sales contract between the parties, with provisions, somewhat complicated, for regulation and adjustments of the price to be paid for the natural gas. I think the illustration suggested on the brief of counsel for the Natural Gas Company of the modernly common landlord and tenant lease contracts presents an apt analogy, the rental being based on the volume of business and incidental profits of the tenant. Here is a profit sharing compensation plan of fixing compensation, but the independence of the status of the parties is otherwise maintained, and the taxes, or other obligations of the parties, are not affected. Another simple illustration: A, a seller, in Dakota, contracts with B, a Tennessee buyer, to sell and ship wheat in such volume as the buyer may require through a given season. The price to be paid A is based on a fixed minimum sum per bushel, plus fifty per cent of any excess realized by the buyer from his sales of the wheat. Does this profit sharing arrangement defeat the interstate commerce immunity of the interstate shipment? I think not.

Since, as above indicated, I construe the holding of the majority opinion to be rested on the partnership in profits theory, I confine this brief comment to this theory. However, I have examined the opinion in Southern Natural Gas [fol. 675] Corporation vs. Alabama, and I think the facts so differ from those of the instant case as to distinguish determinatively the cases. In the Alabama case, as said in the opinion, "under its contract with the Tennessee Com-

pany, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office."

The Tennessee Company had a large number of these plants scattered over the State to which the Southern Natural Gas Company delivered gas through service lines which it owned and maintained, upon orders received and filled from its Birmingham office from time to time. Nearly six hundred miles of its pipes covered the State and carried gas for allotment as required for distribution to these numerous consumer plants. I do not understand that the Memphis Natural Gas Company owned or maintained any service lines, but that the local companies tapped the main pipe line of the Natural Gas Company. The "distinction between the transportation of gas into a State and the furnishing of gas to consumers within the State," to quote the [fol. 676] Alabama opinion, appears to have been preserved, as it was not in that case. Many activities may be carried on within the State without subjecting the interstate transportation to the State taxing power, so long as these activities are merely incidental to the doing of the interstate business. Ozark Pipe Line Corporation vs. Monier, 266 U. S. 555. In that case it was said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business."

I do not find that the Memphis Natural Gas Company [fol. 677] conducted any business in Tennessee which was not incident to, and in furtherance of, its interstate deliver-

ies. These, briefly stated, being my views, I think the decree of the Chancellor should be affirmed.

Chambliss, J.

[fol. 678] IN SUPREME COURT OF TENNESSEE

Davidson Equity. Rev. and Rem.

MEMPHIS NATURAL GAS COMPANY,

vs.

LEWIS S. POPE, et al.

DECREE—May 17, 1941

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed and the original bill be dismissed; the injunction be dissolved and this cause remanded to the Chancery Court of Davidson County in order that a reference may be had for damages against the injunction bond for the wrongful suing out of injunction and for the collection of the costs of the Court below, for which let procedendo issue. The costs of this appeal will be paid by the Memphis Natural Gas Company, principal and United States Fidelity and Casualty Company, surety, for which let *fi. fa.* issue.

[fol. 679] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER CORRECTING AND AMENDING DECREE—May 27, 1941

This cause came on further to be heard on this 27th, day of May, 1941, upon motion of defendant to amend and correct the judgment or decree of the Court entered in this cause on May 17th, 1941. After hearing the motion, the Court was pleased to grant the same and to amend and cor-

rect the decree heretofore entered in this cause in this Court on May 17th, 1941, in the following manner:

1. To amend said decree by striking therefrom that portion of the decree that dismisses complainant's bill and also that portion of the decree that remands the case to the Chancery Court, Part One, Davidson County, at Nashville, for the purpose of giving the defendant an opportunity to have determined any damage that the defendant may have sustained by reason of the injunction that was granted by the Chancery Court at the instance of the complainant.

2. By adding to the decree of the Court heretofore entered: That the Chancellor committed error in holding that the complainant did not owe and should not pay to the State of Tennessee the amount of excise taxes, penalties and interest, due the defendant state, and as set out in the pleadings and the proof for the years 1932, 1933, 1934 and 1935. And under the allegations and prayer of the bill invoking the jurisdiction of the Court under the Uniform Declaratory Judgments Act, the Chancellor committed error in not holding and decreeing that the complainant owed the taxes for said years.

[fol. 680] The appellants on behalf of the State of Tennessee further moved the Court for a declaration that the appellee (complainant) is indebted to the State of Tennessee for the excise tax due for the years 1932-1935, both inclusive, and interest and penalties upon the same, as disclosed by the record in the cause, and moved further, for a judgment for the amount of said taxes, interest and penalties to the date of this decree, and upon consideration of said motion the Court was of opinion that it was within the scope of the pleadings in the present cause not only to grant to the appellants on behalf of the State of Tennessee a declaration that appellee (complainant) is indebted to the State of Tennessee for the said excise taxes, interest and penalties for the years 1932-1935, both inclusive, but also to grant to the State of Tennessee a judgment for the amount of said taxes, interest and penalties for said years in the sum of Sixty Thousand Six Hundred and Thirty-six Dollars and Forty-one cents ($60,636.41).

It is, therefore, Ordered, Adjudged and Decreed that the decree heretofore entered in this cause in this Court on May 17th, 1941, be amended by striking therefrom that portion of the decree which dismisses appellee's (com-

plainant's) bill, and that portion of said decree remanding the cause to the Chancery Court, Part One, Davidson County, it being unnecessary to remand the cause to the Chancery Court because the rights of the parties may be adjudicated here by final decree.

It is further Ordered, Adjudged and Decreed that the decree of the Chancery Court, Part One, Davidson County, be reversed and the injunction authorized and made permanent by said Chancery Court be and the same is hereby dissolved and dismissed;

And it further appearing to the court that the correct amount of taxes, penalties and interest as of May 27th, 1941 is Sixty Thousand Six Hundred Thirty-six Dollars and Forty-one Cents ($60,636.41), it is therefore, Ordered, Adjudged and Decreed that the State of Tennessee have and recover of the appellee (complainant), Memphis Natural Gas Company, the said sum of Sixty Thousand Six Hundred and Thirty-six Dollars and Forty-one Cents ($60,636.41), which is the total amount of said taxes, [fols. 681-682] penalties and interest for the years 1932-1935, both inclusive, to the date of this decree, and all of the cost of this cause, and for the collection of both the judgment and the costs execution will issue.

And it is further Ordered, Adjudged and Decreed that this decree correcting and amending the decree heretofore entered on May 17th, 1941, shall be and is the final decree in the Supreme Court of Tennessee in this cause, effective as of May 27, 1941.

To all of which decree the appellee (complainant) respectfully excepts.

O. K. for Entry: Lewis S. Pope, Whitworth Stokes, M. M. Barry, Ass't Att. Gen., Sols. for Appellants.

[fol. 683] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION OF MEMPHIS NATURAL GAS COMPANY, APPELLEE, TO REHEAR—Filed June 7, 1941

May It Please the Court:

Convinced that an incorrect decision of this cause has been reached, we file this petition to rehear not with for-

lorn hope, not to satisfy a whim of garrulity, or an urge to prolong argument unnecessarily, but with the earnest conviction that by briefly pointing out what we conceive to be the errors of the majority conclusion, we may yet gain from this Court judicial recognition of the true status [fol. 684] of Memphis Natural Gas Company as a transporter of natural gas in interstate commerce.

But for certain provisions of the delivery contract between Memphis Natural Gas Company (herein sometimes called "the pipe line company") and Memphis Power & Light Company, apparently the majority of the Court would have recognized the interstate character of the operations in Tennessee of the pipe line company. In determining that the contract between the interstate transporter and the intrastate distributor created a relationship which stamps "intrastate" on earnings from operations which would otherwise be interstate, the majority of the Court, we submit, not only incorrectly applies the Tennessee Excise Tax Law to cover earnings expressly exempt from the tax, but also deprives the pipe line company of rights guaranteed by the Constitution of the United States.

This claim of Federally protected rights is not an afterthought. It was asserted in the pleadings, in written brief and oral argument. We refer the Court to our original brief, from which we quote:

"The Construction or Application of Sections 1316 to 1318 of the Tennessee Code of 1932 so as to exact from Complainant the Excise Tax provided for by these Sections would 'Constitute a violation of Complainant's rights as guaranteed to Complainant under Article 1, Section 8, Clause 3 of the Constitution of the United States, in that

[fol. 685] (a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.

(b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.

(c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.

(d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.'

The quoted part of the above sub-heading is from complainant's original bill (R. pp. 11, 12), in which complainant claims its rights under the Constitution of the United States. The Chancellor did not find it necessary to go into this constitutional question because of the exclusion by the express terms of the statute of earnings derived from interstate commerce. Having found that all of complainant's earnings were derived from interstate commerce, it was only necessary for him to apply the statute in order to exclude them from the tax.

Our insistence now, however, is that any other construction or application of the statute would be a violation of complainant's constitutional rights and in conflict with Article 1, Section 8, Clause 3 of the Constitution of the United States, which confers upon Congress the power to regulate interstate commerce. Therefore we here and now make that federal question and it is our submission that any other construction or application of the statute to the transactions here involved different from that made by the Chancellor would immediately bring the statute as so construed and applied in conflict with the commerce clause of [fol. 686] the Federal Constitution.

In this connection we point out that the cases which we have already cited and quoted from not only hold that similar transactions there involved were interstate commerce, but were interstate commerce of such nature as to be immune to the tax there involved under Article 1, Section 8, Clause 3 of the Constitution of the United States.

Therefore, again we cite these cases in support of our contention that not only are complainant's earnings exempt from the excise tax provided for, by sections 1316 to 1318, Tennessee Code of 1932, but that they are protected from any such tax by that provision of the Federal Constitution.

Our insistence is that not only has the state expressly refrained from taxing interstate commerce, but that it does not possess the power to impose a tax upon the business in which the complainant was engaged in the years 1932 to 1935, and that if either this statute or any other statute had taxed the business of complainant during those years,

as is now attempted to tax it, such a statute and its application would have been unconstitutional.

State Tax Commission vs. Interstate Natural Gas Company, 284 U. S. 41, 76 L. ed. 156; Paper Book p. 2;
Pennsylvania vs. West Virginia, 262 U. S. 553, 67 L. ed. 1117 (1923);
Missouri, ex rel. Barrett, vs. Kansas Natural Gas Company, 265 U. S. 298, 68 L. ed. 1027 (1924), Paper Book p. 10;
Public Utilities Commission vs. Landon, 249 U. S. 236, 63 L. ed. 577 (1919);
Eureka Pipe Line Company vs. Hallanan, 257 U. S. 265, 66 L. ed. 227 (1921), Paper Book p. 13;
[fol. 687] East Ohio Gas Co. vs. Tax Commission, 283 U. S. 465, 75 L. ed. 1171 (1931), Paper Book p. 19.

We do not elaborate upon this argument because of the full quotations already made from the cases and because we believe we are clearly entitled to prevail under the express terms of the Tennessee statute. But, we earnestly make the insistence because we want it distinctly to appear that this right so claimed under the Federal Constitution is strongly insisted upon." (Brief and Argument on Behalf of Appellee, Memphis Natural Gas Co., pp. 73-75.)

The "main activity"—its sole activity, as we see it—of the pipe line company "that the State cannot touch" (*State Tax Commission vs. Interstate Natural Gas Company*, 284 U. S. 41; our brief, p. 62) was transportation of natural gas in interstate commerce. The majority of the Court apparently concedes that, physically, the pipe line company was not a distributor of the gas which it so transported. Even if the legal imputation of distribution activities to the pipe line company made by the majority of the Court on the strength of its contract with Memphis Power & Light Company were sound (which we do not admit), even so there results no actual intrastate activity carried on by the pipe line company, and, therefore, no taxable earnings from such activity.

The Tennessee Excise Tax Law, as pointed out (our reply brief, pp. 51 et seq.; second reply brief, pp. 6, et seq.) provides by its very terms that the only earnings taxable are those of corporations "doing business in Tennessee" and then only "net earnings arising from business done [fol. 688] wholly within the State, excluding earnings aris-

ing from interstate commerce." Clearly the legal imputation of distribution activities to the pipe line company and the resultant imputation of net earnings from participation in such activities cannot erase from the picture the undoubted transportation activities of the pipe line company in carrying the natural gas from the field to the point of delivery in Tennessee. Such being the situation, it cannot be sustained that the earnings of the pipe line company, however regarded, arose from business done "wholly within the State." Absent one of the essential elements supporting the tax, the tax must fail. The majority opinion gives no consideration to the plain language of the taxing statute.

The excluding language of the Tennessee taxing statute aside, the legal imputation of distribution activities to the pipe line company made by the majority of the Court does not render "intrastate" its admitted transportation activities. This legal imputation arises by reason of an interpretation of the contract with the distributing company. This contract, dealing as it does with the price to be paid for gas delivered, cannot, on any interpretation, regardless of the nature of the relationship between buyer and seller, deprive the pipe line company's activities of their interstate character.

The majority has overlooked, or given no weight to the respectable authority which we cited in our reply brief (p. 110) of *People ex rel., Pennsylvania Gas Company vs. Saxe, et al.*, 229 N. Y. 446, 128 N. E. 673 (1920), in which [fol. 689] the opinion was rendered by Judge Cardozo, later Mr. Justice Cardozo of the Supreme Court of the United States. In fact, the majority, as pointed out in the dissenting opinion, cites no authority "for the adoption of the method or extent of payment by a buyer of goods shipped interstate as a factor determining the taxability of the product."

We submit that on reexamination of its conclusions, the majority will be convinced that even if the contract between the pipe line company and Memphis Power & Light Company had the effect given to it by the majority, nevertheless that effect is no warrant for imposition of the tax involved in this proceeding. As pointed out in our reply brief (p. 105) even if such an arrangement existed "it would not furnish a highway down which the taxing authorities could travel, but a mere *cul de sac.*"

But the legal imputation of distribution activities to the pipe line company is made by the majority under misapprehension of the nature of the relationship between the pipe line company and its customer, Memphis Power & Light Company, and is made without proof of any kind and as the result of inference and conjecture. We do not wish to labor the point. A few illustrations will suffice.

It was distinctly pointed out, for instance, in our reply brief (pp. 112, et seq.) that the financial data required to be supplied by the seller (the pipe line company) under Article Ninth of the Contract, differed from the financial [fol. 690] data required to be furnished by the buyer (Memphis Power & Light Company) under Article Tenth of the Contract, which financial data formed the basis of the contractual division provided for in Article Eleventh of the Contract.

On page 113 of our reply brief, summarizing this data, it was stated that the fifth paragraph of Article Ninth requiring the seller to set out "amount necessary to amortize the seller's investment"; whereas, the fifth paragraph of Article Tenth required the buyer to set out "amount necessary to amortize any additions to its original investment made by the buyer for expanding its natural gas distribution system, but *not including any provision for the amortization of the buyer's original investment for distribution.*"

At page 114 of our brief this last statement which is underscored, is made the subject of a footnote, which reads as follows:

"In this respect the statements to be furnished by the seller on the one hand and by the buyer on the other, are diametrically different."

Nevertheless, on page 9 of the majority opinion, after having set out in summary the data required to be furnished by the seller under the Ninth Article of the Contract (the summary of the data required under paragraph 7 of the Ninth Article is incomprehensible, possibly as the result of typographical errors) the Court proceeds:

"By the Tenth Article buyer was to deliver yearly to seller and to the city of Memphis the same information of [fol. 691] its affairs and operations as those required of seller listed above."

To the failure of the majority opinion to make nice discriminations in the application of the contractual division

statements may be explained, in part, the failure of the majority opinion to interpret the contract between the pipe line company and its customer in accordance with the purport of the contract, the terminology of the contract, the background and setting of the contract, and the application and practical construction of the contract. The distin-tion between amortization of the entire amount of the pipe line company's investment and the amortization only of additions to the original investment of Memphis Power & Light Company for expanding its natural gas distribution system, sheds light on the true nature of the relationship between the parties, as buyer and seller, confronted with an experimental situation where *adjustment of price* of the commodity sold was necessary to permit launching of the venture under equitable conditions. The formulae set forth in the contract are, we submit, what they are stated to be, methods for arriving at an equitable adjustment of the price of gas and the eventual reduction of resale prices to the consumer, a matter which was the chief interest of the City of Memphis in the contract.

As elaborately pointed out in our reply brief, the contract between the pipe line company and the distributing company provides in Article Sixth for stipulated base prices, which constituted the rate schedule for the gas sold. These [fol. 692] base rates were subject to adjustment in accordance with the formulae set out and applied in Articles Ninth, Tenth and Eleventh of the contract, and this adjustment of rates of Article Sixth is the sole effect of the subsequent provisions of the contract.

In holding that the pipe line company and the distributing company were engaged in a joint undertaking, or a cooperative enterprise, or the like, the majority apparently acted on impression and conjecture as has been pointed out. Thus, the majority opinion states that a study of the contract creates "an impression that there was a studied effort to cover up a pooling of interests with the varnish of a sale" (p. 6); there is seen a "scheme of partnership" (p. 6), and speculation as to its origin is indulged in:

"Whether the scheme of separate corporate entity but joint profit was designed in the beginning for purposes of economy, safety in business, and to escape taxation, is a matter which may very reasonably be concluded."

Our point on this phase of the petition is this, and this only: we ask that the Court re-examine the contract between

the pipe line company and the distributing company in the light of the proof. So examined, we believe and submit that the Court will reach the conclusion that here is involved no scheme or device which creates some kind of joint undertaking or co-adventurous effort, but a bona fide contract of purchase and sale with provisions, complicated it is admitted, for readjustment of the price of the commodity sold. [fol. 693] In reaching its conclusions, the majority opinion cites on the main point only two cases:

Lone Star Gas Company vs. Texas, 304 U. S. 224 (Opinion p. 21);

Southern Natural Gas Company vs. Alabama, 301 U. S. 148 (Opinion p. 23).

Each one of these cases is made the subject of extended analysis in our original reply brief, which analysis we will not here repeat. (See reply brief, p. 127, et seq. for analysis of Lone Star case, and reply brief pp. 81, et seq. for discussion of Southern Natural Gas case.)

On the other hand, the majority opinion has either overlooked or failed to give effect to, the determinative cases decided by the Supreme Court of the United States, cited and discussed at length in our reply brief and referred to. We deem it unnecessary here either to repeat the citation or the discussion of these authorities.

While the motivation behind the majority opinion is apparently the contract between the pipe line company and the distributing company, which is held to create a relationship of joint adventure, or the like, nevertheless, the pipe line company is subjected to a tax not only on its net earnings derived from sales of natural gas to Memphis Power & Light Company for distribution to the public, but also on its net earnings derived from sales of gas to Memphis Power & Light Company for use as fuel in its electric generating station and net earnings derived from the sale of [fol. 694] gas to West Tennessee Power & Light Company for distribution. The relationship of joint adventure clearly could not exist with respect to the power house gas and the West Tennessee gas. The earnings from the sale of such gas, therefore, should have been excluded from the tax even on the theory of the majority opinion.

The record shows that the pipe line company consistently maintained its position as a transporter of natural gas across state lines and did no physical act of distribution.

The reduction of pressure of the gas in flow for delivery, and the metering of the gas incident to delivery, were both acts connected with transportation and not connected with distribution. There was no running of service lines and other physical operations of the type held, among other things, to subject Southern Natural Gas Corporation to the Alabama tax. This is so clearly pointed out in the dissenting opinion that to it we make reference rather than to add unnecessarily to the length of this memorandum. The legal considerations pointed out in the dissenting opinion, together with the facts concerning delivery of the gas summarized on pages 80, et seq. of our reply brief, and 3 and 4 of our second reply brief, are, we submit, conclusive as to the non-applicability of the doctrine of "breaking of the original package," upon which reliance is placed in the concurring opinion.

We submit that because it is engaged wholly in interstate transportation of natural gas and not in any distribution activities and because its entire earnings for the period in question were derived from such interstate operations, the [fol. 695] pipe line company is not liable for any excise tax under the wording of the statute itself and under immunity from taxation granted to its operations by the commerce clause of the Constitution of the United States as interpreted by the Supreme Court of the United States. We further submit that upon reconsideration the soundness of our position will be recognized and that this Court should withdraw its former opinion and decree and enter a decree herein affirming the decree of the Chancellor. To that end we pray that this be accepted as a petition to rehear this cause and to grant the relief to which Memphis Natural Gas Company is entitled.

Respectfully submitted, Walter P. Armstrong, T. A. McEachern, Jr., Solicitors for Memphis Natural Gas Company, Appellee.

Armstrong McCadden Allen, Braden & Goodman, Of Counsel.

[fol. 696] *Duly sworn to by T. A. McEachern, Jr. Jurat omitted in printing.*

[fol. 697] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

Davidson County Equity

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE, et al.

OPINION ON PETITION TO REHEAR—Filed June 28, 1941

The claim of constitutional right under Art. 1, Sec. 8, Clause 3 of the Federal Constitution was presented in the original bill of complainant and in briefs and argument. In refusing to sustain the bill and in holding that the business of complainant, furnishing gas in a joint undertaking with the distributing corporation, and in its business relationship as a whole, was intrastate, obviously the claim of federally protected right was decided adversely to complainant.

The point now raised that some of the tax is based upon [fol. 698] net earnings derived from sales of gas to Memphis Power & Light Company for use as fuel in its electric generating station and some from sale of gas to West Tennessee Power & Light Company for distribution by it and could not be a part of the earnings from the joint adventure with Memphis Power & Light Company in furnishing gas to the public in Memphis and vicinity, and hence should be excluded from the tax on the theory of the majority opinion, is not discussed in the opinion. However, that point was apparant and was fully in mind. Though not stated in the opinion, our thought was—and is now—that complainant has not segregated any earnings so far as its brief and argument shows, and is not in the petition. It is not pointed out that there are any net earnings derived from the two sources mentioned. We failed to find in the proof and now fail to find any showing that the asserted tax claim sought to be enjoined contains any net profit from sources other than the vastly major operations, furnishing gas through Memphis Power & Light Company in complainant's intrastate business in Tennessee. Hence that point was not mentioned in the written opinion and we went no further to consider whether such possible earn-

ings from the sale of power house gas and the West Tennessee gas were interstate or intrastate in character.

This suit is to enjoin collection of taxes. If it be true [fol. 699] that there are some profits that might be ascribed to purely interstate commerce, such earnings should have been set out separately with proper definiteness of averment in the bill and then supported by proof and pointed out in brief in order to obtain the injunction. This has not been done.

It seems that though complainant might possibly have presented the question of elimination of some part of the profits outside of this joint business with Memphis Power & Light Company it has not done so, but has rested its case upon its much urged contention that *all* of its business was interstate in character.

The point that we have failed to eliminate the net earnings from business done in transporting the oil from the fields in Louisiana to Tennessee, is not well taken for this transportation is not interstate. This transportation to Tenness is part of one whole scheme of business and cannot be separated from the distribution in Tennessee. Also, there is no basis pointed out by counsel whereby such a calculation can be made by the court.

We have not failed to give to the evidence by witnesses and other documents their proper consideration in construing the whole scheme and relationship from which the conclusion was reached that complainant is not engaged in [fol. 700] interstate commerce.

All matters set up in the petition to rehear were fully considered by the court. The various opinions and authorities cited by petitioner were considered carefully. We see nothing in the petition to rehear that was overlooked in our former study of the case. We did not fail to give proper weight to the various federal authorities, though only a few were cited in the opinion. This case is different from any other in its facts, and many of the cases only afforded limited criteria in aid of a proper conclusion here.

Therefore we find no merit in the petition to rehear and it is denied.

Mr. Justice Chambliss adheres to his original opinion in favor of complainant.

Frank T. Fancher, Special Judge.

[fols. 701-701a] IN SUPREME COURT OF TENNESSEE

ORDER DENYING PETITION FOR REHEARING—June 28, 1941

The court denied petition to rehear in the following case, towit:

Davidson Equity

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS POPE, et al.

[fol. 701-b] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PETITION OF MEMPHIS NATURAL GAS COMPANY FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES, AND FOR SUPERSEDEAS—Filed July 23, 1941

To the Honorable Grafton Green, Chief Justice of the Supreme Court of Tennessee:

Now comes the Memphis Natural Gas Company, petitioner and appellant in this cause, and says that on May 17, 1941 and on May 27th, 1941, the Supreme Court of the State of Tennessee, being the highest court in said state in which a decision could be had in said cause between the above named parties, reversed the Chancery Court of Davidson County, in which this action had been instituted, and rendered final judgment in favor of the defendants below (appellants in this court), and against the Memphis Natural Gas Company, complainant below, (appellee in this court), said judgment being rendered against the Memphis Natural Gas Company in the sum of $60,636.41.

Petitioner further shows that on June 28, 1941, a petition to rehear said judgment was denied by the Supreme Court of Tennessee and that, therefore, there has been entered in the cause judgment against it and in favor of the defendants in the trial court, (appellants in this court) Lewis S. Pope, George F. McCanless, and Roy H. Beeler, in the sum

[fol. 701-b1] of $60,636.41, and petitioner shows that in said final judgment in said cause certain errors were committed to the prejudice of the Memphis Natural Gas Company, appellant, all of which more in detail appear in the assignment of errors filed herewith and made a part hereof.

In the record and proceedings it will appear that petitioner and appellant challenged the validity of Sections 1316-1318 of the official Tennessee Code of 1932, as construed and applied to the transportation and sale of natural gas by it, and insisted that under the Interstate Commerce Clause of the Constitution of the United States, being Article 1, Section 8, Clause 3 of said Constitution, said statutes could not be constitutionally construed as to apply to its transportation and sale of natural gas and, if so applied, said statutes were invalid and contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States, in that they imposed a license or privilege on interstate commerce and placed a burden upon the privilege of carrying on interstate commerce, and amounted to an interference with and obstruction of and an attempted regulation of interstate commerce, thus constituting an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States in Article 1, Section 8, Clause 3 thereof.

In the record and proceedings it will also appear that the petitioner and appellant (in addition to challenging the validity of said Sections of the Code of Tennessee) specially set up the right, privilege and immunity claimed by it under the Constitution in Article 1, Section 8, Clause 3 thereof, which prevents the state from imposing a direct, discrimin-[fol. 701-b2] atory burden upon interstate commerce, in this instance, the sale and transportation in interstate commerce of natural gas.

Petitioner has filed with the clerk of this court an assignment of errors that sets out separately and particularly each error asserted and presents herewith a jurisdictional statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and decree of this court.

Wherefore, the Memphis Natural Gas Company, appellant, prays that upon execution by it of a proper bond, duly approved, appeal may be granted in its behalf in said cause to the Supreme Court of the United States for the correc-

tion of errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States, at Washington.

The Memphis Natural Gas Company, appellant, desires to supersede execution on the judgment rendered against it in this cause and here tenders bond in such form as the Court may require for such purpose, and prays that with the allowance of the appeal, supersedeas may issue.

This July 23, 1941.

Memphis Natural Gas Company, By Walter P. Armstrong, Solicitor. Walter P. Armstrong, T. A. McEachern, Jr., Solicitors for Memphis Natural Gas Company.

[fol. 701-b3] Acknowledgment of Service

Received a copy of the foregoing Petition for Appeal, and endorsements thereon, and acknowledged service of same.

This 23rd day of July, 1941.

Roy H. Beeler, Attorney General of the State of Tennessee. Lewis S. Pope, Lawyer and Investigator. George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee. By Roy H. Beeler.

[fol. 701-c] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

ASSIGNMENT OF ERRORS, ACCOMPANYING PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 23, 1941

Memphis Natural Gas Company, appellant in this cause, in connection with its petition for an appeal this day filed, to-wit, July 23, 1941, assigns the following errors, which it avers occurred in the proceedings in this cause and on a trial thereof and in the opinions and judgments of the Supreme Court of Tennessee, and upon which it relies to reverse said judgments entered herein as appear of record:

I

The Supreme Court of Tennessee erred in holding that Sections 1316, 1317 and 1318 of the Official Tennessee Code of 1932, which sections are as follows:

"Sec. 1316. *Tax imposed.* All corporations and joint stock associations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations and joint stock associations organized under the laws of any other state or county for profit and doing business in Tennessee, shall, without exception, pay to the state comptroller annually an excise tax, in addition to all other taxes, equal to three per cent. of the net earnings for their preceding fiscal year of such corporations and joint stock associations, arising from business done wholly within the state, excluding earnings arising from interstate commerce. Tennessee insurance [fol. 701-c1] companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state."

Sec. 1317. *Credit for certain other taxes paid.* Any corporation or joint stock association, paying the tax imposed, shall be entitled to a credit upon the tax imposed for the amount paid, in the preceding twelve months prior to July 1st of the year in which this tax becomes due, to the secretary of state under the terms of section 4136; insurance companies shall be entitled to a credit for all amounts so paid during the preceding twelve months under section 6 of the general revenue bill, and also under section 5716, and corporations or joint stock associations engaged in mercantile pursuits, and paying the merchants' privilege tax to the State of Tennessee, shall be entitled to a credit for the amount so paid during such preceding twelve months; and all other corporations and joint stock associations shall be entitled to a credit upon the tax herein imposed for any amount paid to the state for such preceding twelve months under any general revenue bill, as a privilege tax, unless otherwise expressly provided in the statute imposing the privilege tax; provided, that the tax herein imposed is a state tax levied for state purposes only, and no county or municipality, or taxing district shall have power to levy any like tax."

"Sec. 1318. *Due, when; penalty.* The tax imposed shall be due and payable on July 1st of each succeeding year; and, if delinquent thirty days, shall be subject to a penalty of one per cent. per month, and, in addition, interest at the rate of six per cent. per annum from July 1st until paid."

would, or could under the Constitution of the United States validly impose the excise tax provided for in said sections upon the earnings of appellant derived from the transportation and sale of natural gas by it from the State of Louisiana to the State of Tennessee and delivered to the Memphis Power & Light Company and the West Tennessee Power & Light Company.

The earnings upon which the Supreme Court of Tennessee held the said excise tax could be imposed were received by appellant for the sale by it of natural gas. This gas was purchased by appellant in the State of Louisiana and delivered to it in said state, transported by appellant by means [fol. 701-c2] of a gas pipe line through the States of Louisiana, Arkansas and Mississippi to Tennessee.

In the State of Tennessee it passed into the pipe lines of the purchasers, Memphis Power & Light Company and West Tennessee Power & Light Company. The gas moved in a continuous flow out of appellant's pipe line into the pipe lines of the purchasing companies and appellant did not own or operate any distribution facilities, any tanks, reservoirs or equipment used for storage of gas, in Tennessee, nor did it treat or process the gas in any way, although it reduced the pressure of the gas as an incident to interstate transportation and in order to make delivery.

Thus the sale of this gas was interstate commerce and the construction and application of said sections of the Tennessee Code to the revenues derived from same was in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States in that it was an attempt to impose a license tax on interstate commerce and also the placing of a burden upon the privilege of carrying on interstate commerce, and was an interference with and obstruction of and an attempted regulation of interstate commerce and the usurpation of power delegated to the Congress of the United States by the Constitution of the United States, and Article 1, Section 8, Clause 3 thereof.

Therefore, said statutes, as construed and applied to the transportation and sale in interstate commerce of natural

gas by the appellant, were unconstitutional and in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, as construed and applied by the Supreme Court of Tennessee.

[fol. 701-c3]

II

In construing and applying Section 1316-1318 of the Official Tennessee Code of 1932, (which sections are hereinabove quoted in full) so as to exact an excise tax from the earnings of appellant derived exclusively from interstate commerce, as above set out, the Supreme Court of Tennessee deprived appellant of the right, privilege and immunity specially set up and claimed by it under the Constitution of the United States, said right, privilege and immunity being claimed under Article I, Section 8, Clause 3 of the Constitution of the United States, which delegates to Congress exclusive control of interstate commerce and prevents interference by a state with said interstate commerce by the imposition of a tax and direct burden on same. The earnings of appellant were derived solely from the sale of natural gas by it in interstate commerce, said gas being delivered to it in the State of Louisiana and transported by it through a pipe line to the State of Tennessee, where it flowed into the pipe lines of the purchasers, Memphis Power & Light Company and West Tennessee Power & Light Company, without ever coming to rest in the State of Tennessee, and without being processed or stored in any way by appellant, and merely being metered and having its pressure reduced by appellant incidental to transportation and in furtherance of interstate delivery.

Thus construed and applied, these sections of the Code place an arbitrary, unequal and unwarranted burden on interstate commerce.

III

The Supreme Court of Tennessee erred in holding that under the contract between the Memphis Natural Gas Company and the Memphis Power & Light Company, there was [fol. 701-c4] a joint enterprise or joint undertaking between said companies which took the business of the Memphis Natural Gas Company in selling and transporting natural gas through its pipe line without the category of interstate commerce, and stamped said sale and transportation by

appellant with all the characteristics of business done wholly within the State of Tennessee.

There was no such joint enterprise under the said contract which was one merely of purchase and sale. Even if there had been a joint enterprise or undertaking between said companies in the sense that they shared profits from the sale of natural gas, yet in pursuance of such an undertaking Memphis Natural Gas Company, appellant, did not do business wholly within the State of Tennessee, but was engaged exclusively in interstate commerce and thus was protected from the imposition of the excise tax provided for in Sections 1316-1318 of the official Code of Tennessee for 1932 (hereinabove fully quoted) and the imposition of said tax on said business was an unwarranted, arbitrary and discriminatory interference with and regulation of interstate commerce, and the statutes thus construed and applied so as to enforce such tax are unconstitutional and in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States.

IV

For which errors the appellant, Memphis Natural Gas Company, prays that said judgments of the Supreme Court of Tennessee dated May 17, 1941 and May 27, 1941, and June 28, 1941, in the above cause be reversed and that the appellees be taxed with the costs.

Memphis Natural Gas Company, by Walter P. Armstrong, Solicitor.

[fol. 701-c5] Walter P. Armstrong, T. A. McEachern, Jr., Solicitors for Memphis Natural Gas Company.

Acknowledgment of Service

Received a copy of the foregoing Assignment of Errors Accompanying Petition For Appeal To The Supreme Court Of The United States, and endorsements thereon, and acknowledged service of same.

This 23rd day of July, 1941.

Roy H. Beeler, Attorney General of the State of Tennessee. Lewis S. Pope, Lawyer and Investigator. George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee, by Roy H. Beeler.

[fol. 701-e] IN SUPREME COURT OF TENNESSEE

[Title omitted]

ORDER ALLOWING APPEAL AND SUPERSEDEAS—July 23, 1941

On this the 23rd day of July, 1941, on reading the petition of Memphis Natural Gas Company, the appellant herein, praying the issuance of an order allowing its appeal to the Supreme Court of the United States from the Supreme Court of Tennessee, and its Assignment of Errors and Jurisdictional Statement in connection therewith,

It appears from all of same, and from the record in the above entifled cause that there was drawn in question the validity of Sections 1316-1318, inclusive, of the Official Code of the State of Tennessee of 1932 on the ground that said statutes and sections of the code, as construed and applied by the Supreme Court of Tennessee, are violative of Article 1, Section 8, Clause 3 of the Constitution of the United States, in that it was asserted that as construed and applied they imposed a license or privilege tax on interstate commerce, placed a burden on the privilege of carrying on interstate commerce and constituted an interference with, and obstruction of, and an attempted regulation of interstate commerce contrary to the powers delegated to the Congress of the United States by said provision of the Constitution of the United States.

[fol. 701e-1] It further appears that the decision of the Supreme Court of Tennessee, the court of last resort in the State of Tennessee, was in favor of the validity of said sections of said code as construed and applied, and that petition for appeal, assignment of errors and jurisdictional statement filed herewith entitle Memphis Natural Gas Company, appellant, to the issuance of this order.

Now, Therefore, It Is Ordered by the undersigned, Chief Justice of the Supreme Court of Tennessee, that said appeal be and the same is hereby allowed; and

It Is Further ordered that appellant, Memphis Natural Gas Company, execute to the appellees, Lewis S. Pope, Lawyer and Investigator, George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee, its supersedeas bond, with surety to be approved by the undersigned in the sum of $70,000.00 conditioned as required by law, that it shall prosecute said appeal to effect,

and that if it shall fail to make its plea good to answer all damages and costs, and further conditioned to pay any amounts ultimately adjudicated against it herein, and upon the filing of said bond and the approval thereof by me, this appeal shall operate as a supersedeas with respect to the judgment and decree herein appealed from.

It Is Further Ordered that the Clerk of this Court within forty days from this date make and transmit to the Clerk of the Supreme Court of the United States, under his hand and the seal of this Court, a transcript of the record herein, containing a true copy of all material parts of the record herein, which shall be designated by praecipe filed with him [fols. 701e-2-701h] by any of the parties hereto.

Dated this 23rd day of July, 1941.

Grafton Green, Chief Justice of the Supreme Court of Tennessee. (Seal.)

Acknowledgment of Service

Received a copy of the foregoing Order Allowing Appeal and Supersedeas, and endorsements thereon, and acknowledged service of same.

This 23rd day of July, 1941.

Roy H. Beeler, Attorney General of the State of Tennessee. Lewis S. Pope, Lawyer and Investigator. George F. McCanless, Commissioner of Finance and Taxation of the State of Tennessee. By Roy H. Beeler.

[fol. 701-i] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED IN TRANSCRIPT ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 23, 1941

To the Clerk of the Supreme Court of Tennessee:

You are requested by the appellant, Memphis Natural Gas Company, to incorporate in the transcript of record in the above styled cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed upon petition of Memphis Natural Gas Company the following:

(1) Petition for appeal and supersedeas with endorsement thereof, and acknowledgment of service of same;

(2) Assignment of errors accompanying petition for appeal, and acknowledgment of service thereon;

(3) Jurisdictional statement accompanying petition for appeal, and acknowledgment of service thereon;

(4) Order allowing appeal and supersedeas, and acknowledgment of service thereon;

(5) Citation, and acknowledgment of service thereon;

[fol. 701i-1] (6) Supersedeas bond, and acknowledgment of service thereon;

(7) Statement directing attention to provisions of Rule 12 (3) of the Supreme Court of the United States, and acknowledgment of service thereon;

(8) This praecipe, and acknowledgment of service thereon;

(9) Transcript of the entire record transmitted to the Supreme Court of Tennessee by the Chancery Court of Davidson County, and all exhibits thereto;

(10) The following portions of the printed brief of the Memphis Natural Gas Company in the Supreme Court of Tennessee, which brief was styled Brief and Argument on Behalf of Appellee, Memphis Natural Gas Company: Propositions of Law II, III and IV of said brief appearing on pages 40, 41 and 42 thereof, and pages 73 to 75, inclusive; and assignments of error of Lewis S. Pope, et al., in the Supreme Court of Tennessee.

(11) The opinion of the Chancellor of the Chancery Court of Davidson County, Tennessee; Memorandum Opinion of Chief Justice Green in denying supersedeas.

(12) All opinions of the Supreme Court of Tennessee, including the majority opinion of the Court delivered on the 17th day of May, 1941 by Mr. Justice Fancher, concurring opinion delivered on said date by Mr. Justice McKinney, and dissenting opinion delivered on said date by Mr. Justice Chambliss; the opinion of the Court delivered by Mr. Justice Fancher on the 28th day of June, 1941, denying the petition to rehear.

[fols. 701i-2–701i] (13) All orders, judgments and decrees entered by the Supreme Court of Tennessee in said cause.

Dated this 23d day of July, 1941.

Memphis Natural Gas Company, by Walter P. Armstrong, Solicitor.

Acknowledgment of Service

Received a copy of the above Praecipe indicating portions of record to be incorporated in transcript on appeal to the Supreme Court of the United States, and acknowledged service of same this July 23rd, 1941.

Roy H. Beeler, Attorney General of the State of Tennessee; Lewis S. Pope, Lawyer and Investigator; George F. McCanless, Commissioner of Finance & Taxation of the State of Tennessee, by Roy H. Beeler, Atty. Genl.

[fol. 703] Exhibit A to Testimony of M. S. Binswanger

Mr. Johnson then presented to the meeting a form of agreement dated as of May 24, 1928, between the Company and Memphis Power & Light Company for the sale and delivery by this Company to said Memphis Power & Light Company for a long term period of natural gas to supply the entire natural gas requirements of Memphis Power & Light Company in the distribution of natural gas for domestic and industrial consumers in and about the City of Memphis, subject to the provisions contained in said contract. Said contract was duly considered and a copy thereof delivered to the Secretary for the records of the Company. It was thereupon moved by Mr. Johnson and seconded by Mr. Powel that the following resolution be adopted:

Resolved, that the officers of this Company be and they hereby are authorized and directed to enter into an agreement dated as of May 24, 1928, with Memphis Power & Light Company in the form presented to this meeting, or substantially in said form, with such changes therein as may be approved by the officers executing said agreement, such execution constituting conclusive approval of said agreement.

Resolved Further, that any and all action of the officers of this Company of the character herein authorized be and the same hereby is ratified and confirmed.

Upon the question of the adoption of said resolution having been duly put to vote, all of the Directors of the Company present at the meeting and being more than a majority of said Board voted in favor of the adoption of said reso-

lution and the same was by the Chairman of the meeting declared to have been duly adopted.

[fol. 703-a] Mr. Johnson then presented to the meeting a form of agreement dated as of May 24, 1928, between this Company and Memphis Power & Light Company for the sale and delivery by this Company for a long term period of natural gas for fuel for the electric power plant of the Memphis Power & Light Company, subject to the provisions contained in said contract. Said contract was duly considered and a copy thereof delivered to the Secretary for the records of the Company. It was thereupon moved by Mr. Johnson and seconded by Mr. Powel that the following resolution be adopted:

Resolved, that the officers of this Company be and they hereby are authorized and directed to enter into an agreement with Memphis Power & Light Company in the form presented to this meeting, or substantially in said form, with such changes therein as may be approved by the officers executing said agreement, such execution constituting conclusive approval of said agreement.

Resolved Further, that any and all action of the officers of this Company of the character herein authorized be and the same hereby is ratified and confirmed.

Upon the question of the adoption of said resolution having been duly put to vote, all of the directors of the Company present at the meeting and being more than a majority of said Board voted in favor of the adoption of said resolution and the same was by the Chairman of the meeting declared to have been duly adopted.

[fol. 703b] I, Malcolm A. Phillips, do hereby certify that I am the duly constituted and presently acting Assistant Secretary of Memphis Natural Gas Company; that the foregoing is a true and correct copy of certain resolutions adopted at a meeting of the Board of Directors of Memphis Natural Gas Company duly held on August 14, 1928, at which a quorum was present; that said resolutions have not in any respect been amended, rescinded or annulled; and that the same are now in full force and effect.

In Witness Whereof, I have hereunto set my hand as such Assistant Secretary and have affixed the seal of Memphis Natural Gas Company, this fifteenth day of December, 1938.

M. A. Phillips, Assistant Secretary.

[fol. 704] EXHIBIT B(1) TO TESTIMONY OF M. S. BINSWANGER

Board of Directors of Memphis Power & Light Co.

1928-1929

H. C. Abell —reelected May 17, 1928 and May 16, 1929
F. N. Fisher " " " " " " " "
John R. Flippin " " " " " " " "
C. E. Grosbeck " " " " " " " "
C. J. Haase " " " " " " " "
J. P. Norfleet " " " " " " " "
F. B. Odlum " " " " " " " "
J. F. Ramier " " " " " " " "
T. H. Tutwiler " " " " " " " "
Henry Wetter " " " " " " " "

E. P. Summerson—from Jan. 1, 1928 to May 17, 1928
O. H. Simonds—from May 17, 1928 thru Jan. 1, 1930

[fol. 705] EXHIBIT B 2 TO TESTIMONY OF M. S. BINSWANGER

Board of Directors of Memphis Natural Gas Co.

1928-1929

Original Directors:	George H. Jirgal Emil N. Levin William N. Short	Resigned Aug. 7, 1928
From August 7, 1928 to February 15, 1929	H. G. Scott Birger L. Johnson S. F. Powell, Jr. A. H. Wall E. F. Berberich	Resigned February 15, 1929
From February 15, 1929 to March 26, 1929	H. G. Scott Birger L. Johnson H. B. Snider M. S. Binswanger H. D. Boenning	
From March 26, 1929 to January 1, 1930	M. S. Binswanger H. C. Abell H. D. Boenning Birger L. Johnson H. G. Scott H. B. Snider O. H. Simonds	

[fol.706] EXHIBIT C TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Ninth Annual Report for the Year 1937

[fol. 706-1] EXHIBIT C TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Directors

W. P. Armstrong	Memphis, Tenn.
Carl F. Bauman	Charleston, W. Va.
Milton S. Binswanger	Memphis, Tenn.
Marshall Eskridge	San Antonio, Texas
Birger L. Johnson	Memphis, Tenn.
John J. Klise	Wooster, Ohio
Alden T. Shotwell	Monroe, La.

Officers

Milton S. Binswanger	Chairman of the Board
Birger L. Johnson	President
John J. Klise	Vice President
Truman R. Hawley	Vice President
Patrick D. Koontz	Vice President
Harry B. Lambert	Vice President
Henry C. Wallace	Vice President
Frank R. Hurlbutt	Secretary
Carl F. Bauman	Treasurer
A. Cooper Dearth	Assistant Treasurer

Offices

Operating Office	Sterick Building, Memphis, Tenn.
Transfer Agent	Suite 3301—50 Broadway, New York, N. Y.
Corporate Office	19-21 Dover Green, Dover, Delaware

[fol. 706-2] Memphis Natural Gas Company

(A Delaware Corporation)

To the Shareholders:

The Board of Directors submits herewith the annual report of Memphis Natural Gas Company for the year

1937. The said year was the ninth of your company's existence.

The earnings for the year amounted to $744,635.16, compared with $517,819.42 for 1936 and $249,826.50 for 1935. The earnings for the year were equivalent after dividends on the preferred stock to seventy-seven cents a share on the 918,680 shares of common stock outstanding. After deducting the cost of preferred stock purchased in the year in excess of the amount received when the stock was issued, the earnings for the year were equivalent to seventy-one cents a share on the common stock. Dividends declared and paid during the year on preferred and common stock amounted to $585,501, regular dividends amounting to $7 a share being declared on the outstanding preferred stock and dividends aggregating sixty cents a share, without establishing any regular dividend rate, being declared on the outstanding common stock.

The increase in revenues from the sale of gas was 14.7%, and the increase in the quantity of gas sold in thousand cubic feet was 12.8%, as compared with the previous year. The increase in the total amount paid for gas purchased was 11.9%.

General taxes were $128,014, an increase of 5.9%, and the Federal income and surtax on undistributed profits were provided for in an amount of $155,200, an increase of 63.9%.

Provision for depreciation or amortization of the investment in pipe line, equipment, and facilities is made in the accounts on the basis of the expected useful economic life of the property as measured by the estimated available gas supply. The amount charged to income in 1937 was $348,000, an increase of $8,000 over 1936. The aggregate provision conforms to the allowance claimed in the amended income tax returns.

[fol. 706-3] During the year the company made physical additions and improvements of the pipe line property in the aggregate amount of $620,000. The additions were principally two new compressing stations which were installed to meet the increase in the sales of gas. Additional oil leases and interests in oil royalties were acquired at a cost of $62,928.

Pursuant to the sinking fund requirement of the preferred stock, 459 shares were retired and cancelled in 1937. In addition, 2,128 shares were purchased and retired. The total expenditure was $283,342.25. Dividends on the pre-

ferred stock have been regularly declared and are fully paid.

In February 1937, the company paid the $120,000 purchase lien note which appeared in the balance sheet at December 31, 1936.

As of March 1, 1937, the company owned $650,000 principal amount of notes of West Virginia Gas Corporation, which amount included the $470,000 principal amount of such notes owned as of December 31, 1936. On or about March 1, 1937, the company purchased $2,019,500 principal amount of 5% Sinking Fund Mortgage bonds of West Virginia Gas Corporation at the price of 92, or a total of $1,857,940, and made payment therefor with the $650,000 principal amount of notes and $1,207,940 in cash. Subsequently during the year the company sold privately $150,000 principal amount of said bonds at the average price of 96 2/3 and sold to the West Virginia Gas Corporation sinking fund an additional $80,000 principal amount of such bonds at par and accrued interest. The interest received by the company during the year on said bonds amounted to $79,081.94. The total initial issue of such bonds by West Virginia Gas Corporation was $2,350,000 principal amount thereof, secured by a first mortgage on physical properties and securities having a value as fixed by independent engineers of in excess of $5,000,000. The net earnings of West Virginia Gas Corporation and its subsidiary, Monickel Gas Company, for the year 1937 were $400,542.73, prior to depreciation and depletion and interest deductions. Since December 31, 1937, your company has sold an additional $30,000 principal amount of such West Virginia Gas Corporation bonds to the West Virginia Gas Corporation sinking fund at par and accrued interest.

During the year the company borrowed from the Guaranty Trust Company of New York from time to time a total of [fol. 706-4] $2,000,000, which was applied to the payment of the costs of the physical additions and improvements to pipe line property, the payment of the $120,000 purchase lien note, the retirement of preferred stock, the purchase of West Virginia Gas Corporation bonds and the payment of common stock dividends. Repayments out of earnings on account of such loans during the year amounted to $418,400, leaving a balance of $1,581,600 owing at December 31, 1937. Additional repayments out of earnings amounting to $466,

000 have been made since December 31, 1937, leaving a balance of $1,115,600 owing at this date.

Your Company purchases all of its gas in Louisiana under a contract which runs primarily to January 1, 1944, but provides for an extension (up to January 1, 1954) upon the same terms and conditions (except as to price) if and so long as the seller has natural gas available for sale to your Company. Beginning January 1, 1935, the price to be paid for gas under this contract increases each three years for the balance of the primary term of this contract. This will add $100,000 in 1938 to the cost of gas purchased (on the basis of present sales) over the cost in 1937. If the contract is extended the price beginning January 1, 1944, is to be fixed by mutual agreement between the seller and buyer or by arbitration.

The accounts for the year 1937 have been audited by Will-A. Clader, the independent certified public accountant selected for the purpose by the Board of Directors, in accordance with established practice, who has audited the accounts since the organization of the Company. The accountant's report appears on page 5.

By order of the Board of Directors.

Birger L. Johnson, President.

Dover, Delaware, May 2, 1938.

NOTE: This report is solely for the information of stockholders and is not a representation, prospectus, or circular in respect of any stock of any corporation, and is not transmitted in connection with any contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security.

[fol. 706-5]

Will-A. Glader

(Certified Public Accountant)

Accountants and Auditors

Packard Building Philadelphia

April 30, 1938.

Opinion of Independent Certified Public Accountant

To the Board of Directors of Memphis Natural Gas Company:

We have made an examination of the balance sheet of Memphis Natural Gas Company (a Delaware corpora-

tion) as at December 31, 1937, and of the statement of income and surplus for the year 1937. In connection therewith, we examined or tested accounting records of the company and other supporting evidence and obtained information and explanations from officers and employees of the company; we also made a general review of the accounting methods and of the operating and income accounts for the year, but we did not make a detailed audit of the transactions.

In our opinion, based upon such examination, the accompanying balance sheet and related statement of income and surplus fairly present, in accordance with accepted principles of accounting consistently maintained by the company during the year under review, its position at December 31, 1937, and the results of its operations for the year.

Will-A. Clader, Certified Public Accountant.

[fol. 706-6]

Memphis Natural Gas Company
(A Delaware Corporation)
Balance Sheet—December 31, 1937

Assets and Deferred Charges

Property, plant and equipment	$8,521,491.05	
(These figures represent cost, and do not purport to be present realizable values.)		
Less reserve for depreciation	2,841,572.05	
		$5,679,919.00
Investment in oil properties (at cost)	$ 561,843.91	
Less reserve for depreciation and depletion	57,449.95	
		504,393.96
Investment in 5% mortgage bonds of West Virginia Gas Corporation, due March 1, 1952 $1,789,500 principal amount, at cost (deposited as collateral on notes payable)		1,646,340.00
Current assets		
Cash (on deposit with banks subject to cheque)	$ 140,260.31	
Cash deposited for dividend payable	6,711.25	
Accounts receivable	383,103.81	
Interest receivable	29,825.00	
Materials and supplies (as certified by officials of the company as to quantities)	10,617.28	
		570,517.65
Repayments		5,043.84
Organization and other expenses in process of amortization		15,730.00
		$8,421,944.45

[fol. 706-7] Liabilities, Capital and Surplus

Capital stocks		
$7 cumulative preferred stock (Authorized 20,000 shares without par value. Redemption price and preference in liquidation $110 a share) 3,835 shares outstanding (a)	$ 345,150.00	
Common stock (Authorized 1,000,000 shares of $5 par value each) 918,680 shares outstanding	4,593,400.00	
		$4,938,550.00
Promissory notes		
Due March 1, 1939	$ 381,600.00	
Due Sept. 1, 1939	650,000.00	
(Secured by $,289,500 principal amount of West Virginia Gas Corporation bonds)		1,031,600.00
Current liabilities		
Promissory note, due March 1, 1938 (secured by $500,000 principal amount of West Virginia Gas Corporation bonds)	$ 400,000.00	
Notes payable	150,000.00	
Accounts payable	224,727.68	
Dividends on preferred stock, payable Jan. 1, 1938	6,711.25	
		781,438.93
Accrued liabilities		
Taxes	$ 88,307.75	
Federal income tax and surtax on undistributed profits (subject to review by the Government)	170,872.75	
Interest	1,035.69	
		260,216.19
Corporate surplus		
Paid in surplus	$ 801,680.39	
Created by changing common stock without par value to common stock of the par value of $5 a share, less expense of retiring bonds in 1930.		
Earned surplus (a)	608,458.94	
		1,410,139.33
		$8,421,944.45

(a) 6,165 shares of preferred stock were acquired and cancelled. The aggregate cash expenditure was $600,881.55, resulting in a charge of $46,031.55 to the surplus account, being that amount in excess of the $90 a share consideration received for the stock when it was issued.

Contingent Liability—Louisiana power tax for the years 1933-1937 and Arkansas sales tax in the approximate amount of $20,000 disputed at the end of the year by the company. Since the date of this Balance Sheet, the Court has held that the tax is constitutional. This liability is covered by a $17,000 surety bond.

[fol. 706-8] Memphis Natural Gas Company

Income Account

	1937	1936
Revenues		
Sale of gas	$2,740,909.04	$2,389,943.27
Oil revenues—net (details on page 9)	33,098.03	6,920.64
Interest	84,323.56	10,120.11
Profit from sale of securities	8,824.76	.....
Miscellaneous	2,297.87	5,859.94
Total	$2,869,453.26	$2,412,843.96
Expenses		
Gas purchased	$1,057,079.90	$ 944,400.77
Maintenance	71,116.00	89,579.11
Transmission system operation	168,587.06	112,166.79
General and administrative	100,325.73	97,811.98
Gas used by company—Cr	*18,298.43*	*13,177.70*
Management	67,350.41	61,737.67
Taxes	128,013.90	120,915.21
Federal income tax (provision)	135,000.00	93,000.00
Surtax on undistributed profits (provision)	20,200.00	1,700.00
Provision for depreciation	348,000.00	340,000.00
Total	$2,077,374.57	$1,848,133.83
Gross income	$ 792,078.69	$ 564,710.13
Deductions		
Interest	$ 40,443.53	$ 7,275.00
Amortization of organization expenses	7,000.00	7,000.00
Mississippi levee taxes 1929-1933	.....	32,615.71
Total	$ 47,443.53	$ 46,890.71
Net corporate income	$ 744,635.16	$ 517,819.42
Less dividends on preferred stock	34,293.00	44,954.00
Balance (to the surplus account)	$ 710,342.16	$ 472,865.42

[fol. 706-9] Oil Operations

Revenues		
Oil Sales	$ 174,022.00	
Miscellaneous	151.70	
		$174,173.70
Expenses		
Royalties and lease rentals	$ 29,417.28	
Labor and expenses	7,552.00	
General expenses	17,723.57	
Well drilling expense	16,437.55	
Unproductive well drilling	3,417.50	
Taxes	10,406.42	
		77,954.32
		$ 96,219.38
Deductions		
Depreciation and depletion	$ 42,491.20	
Leaseholds abandoned	18,280.15	
Amortization of deferred expenses	2,350.00	
		63,121.35
Net earnings (exclusive of income tax which cannot be apportioned because of graduated rates)		$ 33,098.03

Surplus Account	1937	1936
Earned surplus at beginning of year	$ 499,837.03	$492,705.66
Net income for year, after payment of dividends on preferred stock	710,342.16	472,865.42
	$1,210,179.19	$965,571.08
Preferred stock retired at a cost in excess of $90 a share capital contribution	50,512.25	6,394.05
	$1,159,666.94	$959,177.03
Less—dividends on common stock	551,208.00	459,340.00
Earned surplus at end of year	$ 608,458.94*	$499,837.03

* Includes a charge of $46,031.55 in connection with the retirement of preferred stock, representing the excess of the retirement price over the $90 a share capital contribution.

[fol. 706-10, 706-11]

Memphis Natural Gas Company

Comparative Income Account

Year	Gross revenues	Operating expenses and taxes	Depreciation	Interest	Extraordinary Maintenance reserve	Other deductions	Net Income	Dividends: $7 Preferred stock	Dividends: Common stock	Yearly surplus income
1928	.....	.....	.....	.....	.....	.....	.....	$ 12,446	.....	$ *12,446**
1929	$ 1,086,460	$ 568,208	$ 262,500	$422,988	.....	$ 1,813	$ 169,050*	70,000	.....	239,050*
1930	1,571,057	755,680	270,600	198,784	.....	1,813	344,180	67,375	$ 230,000	46,805
1931	1,593,551	735,747	285,100	14,142	.....	1,813	556,749	61,152	551,802	*56,205**
1932	1,664,205	864,704	312,500	97,006	.....	1,813	388,183	56,884	137,802	193,497
1933	1,600,958	857,346	313,000	72,516	.....	1,006	357,090	53,466	.....	303,624
1934	1,733,591	1,000,726	331,700	66,555	$ 50,000	5,343	279,267	51,761	91,868	135,638
1935	2,000,796	1,243,928	375,000	44,238	82,804	5,000	249,826	47,990	91,868	109,968
1936	2,412,844	1,508,134	340,000	7,275	.....	39,616	517,819	44,954	459,340	13,525
1937	2,869,453	1,729,375	348,000	40,443	.....	7,000	744,635	34,293	551,208	159,134
Total	$16,532,915	$9,263,848	$2,838,400	$963,947	$132,804	$65,217	$3,268,699	$500,321	$2,113,888	$654,490

* Denotes deficit.

The above table reflects the adjustments of income in the years 1929-1932 as explained in the 1933 annual report and the adjustments in the annual reports for the years 1930-1931.

Less preferred stock purchased and retired at a cost in excess of $90 a share capital contribution	46,031
Earned surplus balance December 31, 1937	$608,459

Memphis Natural Gas Company

Gas Sales

Year	Total		Memphis Power & Light Company			
			—Power House Contract—		—City and County Delivery Contract—	
	Gross revenue from sale of gas	Per cent of revenue from Memphis P. & L. Co.	Revenue	Per cent of total revenue	Revenue	Per cent of total revenue
1929	$1,078,063	92.54	$570,454	52.91	$ 427,180	39.63
1930	1,556,934	84.66	592,991	38.09	725,078	46.57
1931	1,585,620	83.58	581,283	36.66	743,987	46.92
1932	1,656,553	83.24	554,720	33.49	824,207	49.75
1933	1,594,668	83.80	529,754	33.22	806,514	50.58
1934	1,726,392	81.47	479,688	27.78	926,838	53.69
1935	1,993,404	80.06	485,244	24.34	1,110,821	55.72
1936	2,389,943	78.84	529,785	22.17	1,354,419	56.67
1937	2,740,909	79.16	595,874	21.74	1,573,793	57.42

Power House Contract

The power house contract mentioned in the above schedule required a reduction in the price of gas fixed by the contract whenever a reduction in the electric rates of Memphis Power & Light Company became effective prior to December 31, 1933. Such reduction occurred October 1, 1932, resulting in a lower sale price for gas thereafter.

This contract also required that after 1933 the sale price of gas thereunder should be on a comparable basis with the cost to Memphis Power & Light Company for other fuel. This resulted in a still lower sale price for gas since 1933. The price of gas in all future years is subject to this factor. This contract expires January 1, 1944.

City and County Delivery Contract

The city and county delivery contract mentioned in the above schedule contains base rates for sale of gas to Memphis Power & Light Company for certain specified uses. The total revenue from the sale of gas under this contract is subject to an annual adjustment to equalize the profits or losses of both parties as calculated by a complicated formula prescribed in the contract. The effect of such adjustment, which is made by the payment of cash by the proper party, is to increase or decrease the revenue to Memphis Natural Gas Company from the sale of gas under this contract.

[fol. 707] EXHIBIT C(1) TO TESTIMONY OF M. S. BINSWANGER

Annual Report of Memphis Natural Gas Company for the Year Ended December 31, 1932

To the Shareholders:

Your Company is engaged in the transportation of natural gas and operates a pipe line from the Monroe Gas Field in Northern Louisiana to Memphis, Tennessee, a distance of 210 miles, and thence to Jackson, Tennessee, a further distance of 100 miles. Your Company has no gas production of its own, but purchases its requirements in the Monroe Gas Field and sells to Public Utilities operating in Memphis, Jackson and other cities contiguous to the pipe line, under purchase and sale contracts extending until 1943 or later.

Total sales of natural gas during the year were 9,189,022,400 cubic feet as compared to 9,224,088,600 cubic feet in 1931. The year 1932 was the first full year of operation of the pipe-line extension constructed in 1931 from Memphis to Jackson, Tenn., and the sales of natural gas from this extension, together with a substantial increase in sales of natural gas for commercial-heating purposes, practically offset a decline in sales for industrial purposes.

Appended hereto are the balance sheet of the Company as of December 31, 1932, and a comparative income statement for the 12 months ended that date, as certified to by Certified Public Accountants.

Gross operating revenue of $1,656,553 in 1932 was an increase of $27,595 over that for 1931. Total operating expenses of $860,147 in 1932 compared with $754,463 in 1931. Operating expenses, except for the cost of gas and provision for taxes, decreased 22%, giving effect to a non-recurring item of $18,716 in 1931; but, because of the increase in the unit cost of gas purchased in accordance with the terms of the gas purchase contract above referred to and because of increases in taxes, total operating expenses increased $105,684. With operating revenues substantially the same in 1932 as in 1931 and with an increase of 14% in operating expenses, net revenue from operation decreased from $874,495 in 1931 to $796,406 in 1932, or 9%.

The property was maintained in good operating condition during the year. No new construction was undertaken.

As at December 13, 1931, notes and accounts payable were $1,009,275, most of which were incurred in connection with the construction of the pipe-line extension from Memphis to Jackson, Tenn. Accounts payable, as at December 31, 1932, was $77,901 at which date the Company had no bank loans.

In January, 1932, the Company sold $750,000 First Mortgage 6% 5-Year Sinking Fund Bonds due January 1, 1937, the proceeds from which were used to reduce notes and accounts payable, and during the year 1932 $161,000 of these bonds were retired.

[fol. 707-1] At a special meeting of the stockholders, held January 24, 1933, the stated capital of the Company was reduced to $5,313,400, represented by 8,000 shares of $7 Cumulative Preferred Stock without par value (having a value in liquidation of $110 per share) and 918,680 shares of Common Stock of the par value of $5 each, which is reflected in the balance sheet made a part of this report.

Fixed capital account has been reduced by $3,527,791, representing the amount at which intangible items valued by appraisal in 1929 had previously been included.

During the year, the number of outstanding shares of $7 Cumulative Preferred Stock was reduced from 8,537 to 8,000 shares through purchases by the Company in the open market.

There were paid during the year the regularly quarterly dividends on the $7 Cumulative Preferred Stock of the Company, and dividends of 15¢ each per share were paid on the Common Stock of the Company January 15th and April 15th.

By order of the Board of Directors.

O. H. Simonds, President.

February 18, 1933, 100 William Street, New York, N. Y.

[fol. 707-2] MEMPHIS NATURAL GAS COMPANY

*Balance Sheet—December 31, 1932

Assets and Other Debits

Property, plant and equipment		$7,924,498.92
Sinking fund deposit		1,000.00
Current assets		
Cash	$16,951.88	
Cash deposited for bond interest and dividend payments	31,670.00	
Accounts receivable	224,772.52	
Materials and supplies	22,780.35	
		296,174.75
Unamortized debt discount and expense, prepayments and deferred charges		73,211.32
Total assets and other debits		$8,294,884.99

Liabilities and Other Credits

Funded Debt		
First Mortgage 6% 5-Year Sinking Fund Bonds	$589,000.00	
6% Purchase Lien Note due October 12, 1944	120,000.00	
6% Purchase Lien Note, final semi-annual payment due November 1, 1943	178,296.81	
		$887,296.81
Capital Stocks		
$7 Cumulative Preferred Stock (Authorized 20,000 shares without par value. Redeemable at and preference in liquidation—$110 per share) 8,000 shares outstanding	$720,000.00	
Common Stock (Authorized 1,000,000 shares of $5 par value) 918,680 shares outstanding	4,593,400.00	
		5,313,400.00
Current liabilities		
Accounts payable	$77,900.52	
Interest on bonds, payable January 1, 1933	17,670.00	
Dividends on preferred stock, payable January 1, 1933	14,000.00	
		109,570.52
Accrued liabilities		89,467.80

[fol. 707-3]

Reserves		
Renewals and replacements	$599,720.77	
Other reserves	9,711.55	
		609,432.32
Earned surplus	$484,037.15	
Capital Surplus (Paid-in)	801,680.39	
		1,285,717.54
Total liabilities and other credits		$8,294,884.99

*Gives effect to changes in connection with reduction of capital in January, 1933.

[fol. 707-4] MEMPHIS NATURAL GAS COMPANY

Income Account

Year Ended December 31

	1932	1931
Operating revenues	$1,656,552.86	$1,628,957.85
Operating expenses, maintenance, and all taxes	860,146.77	754,463.22
Net revenue from operations	$ 796,406.09	$ 874,494.63
Other income	7,652.43	24,903.11
Gross corporate income	$ 804,058.52	$ 899,397.74
Deductions		
Interest	$ 65,454.01	$ 31,114.44
Amortization of debt discount and expense	31,551.71	
	$ 97,005.72	$ 31,114.44
Balance before appropriation for renewals and replacements	$ 707,052.80	$ 868,283.30
Appropriation for renewals and replacements	200,000.00	200,000.00
Balance available for preferred stock dividends	$ 507,052.80	$ 668,283.30
Dividends on preferred stock	56,883.75	61,152.00
Balance	$ 450,169.05	$ 607,131.30

*Analysis of Surplus

	1932	
Earned Surplus, beginning of year	$ 204,650.72	
Additions		
Surplus income, after preferred stock dividends, for year	450,169.05	
In connection with reacquisition of preferred stock	18,436.50	
Adjustment (contra capital surplus)	30,000.00	
	$ 703,256.27	
Deductions		
Common stock dividends $137,802.00		
Contractual settlement for prior year 81,417.12		
	219,219.12	
Balance earned surplus		$ 484,037.15
[fol. 707-5]		
Capital surplus beginning of year	$2,032,167.39	
Additions		
Amortization of intangibles in prior years	234,224.95	
Common stock reduction to $5.00 par value a share	2,183,634.00	
	$4,450,026.34	
Deductions		
Increase in stated value of preferred stock	$ 90,555.00	
Adjustment (contra earned surplus)	30,000.00	
Intangibles valued by appraisal in 1929	3,527,790.95	
	$3,648,345.95	
		801,680.39
Total surplus end of year		$1,285,717.54

* Gives effect to changes in connection with reduction of capital in January, 1933.

[fol. 708] EXHIBIT C(2) TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Fifth Annual Report for the Year 1933

[fol. 708-1] Memphis Natural Gas Company

Directors

John C. Adams	M. S. Binswanger
W. P. Armstrong	Marshall Eskridge
Carl F. Bauman	John J. Klise

Officers

M. S. Binswanger	President
D. C. Shaffer	Vice President
John J. Klise	Vice President
Patrick D. Koontz	Vice President
Harry B. Lambert	Vice President
F. R. Huributt	Secretary
Carl F. Bauman	Treasurer
H. P. Scott	Assistant Treasurer

[fol. 708-2] Memphis Natural Gas Company

To the Shareholders:

The Board of Directors submits herewith a report of the operations of Memphis Natural Gas Company for the fiscal year which ended December 31, 1933, together with a statement of the finances and property at the close of that year.

The accounts show a net income of $303,623.78 in 1933 after the payment of preferred stock dividends and adequate provision for depreciation, as compared with $331,298.99 in 1932. The decrease was due principally to a decline in business.

The sinking fund requirement amounts to $150,000 yearly in cash or bonds at par. These requirements have been fully met. The company used $139,970 during the year for sinking fund requirement by retiring $72,000 principal amount of bonds and depositing cash with the Trustee to cover $67,000 of bonds, the requirement having been anticipated by $11,000 in 1932. Bonds in the principal amount of $43,000 were called for redemption on January 1, 1934 out of cash in the sinking fund.

The Company expended $28,831 during the year for the sinking fund requirement of the preferred stock, retiring 364 shares of the said stock. Dividends on the preferred stock have been regularly declared and are fully paid.

The attention of your Board of Directors was called during the year to the apparent insufficiency of the provision which has been recorded on the books in prior years for depreciation and amortization of investment by the end of its expected useful economic life. A survey of the property was made by engineers and independent accountants who advised that the reserve accumulated in the four years from 1929 to 1932 was insufficient in the amount of $530,700. There has been included in the accompanying accounts an adjustment of the reserve provision for prior years by a charge to surplus of said amount, and a reserve provision [fol. 708-3] of $313,000 was made for 1933. The Company was thus able to obtain from the accountants a report without the qualification respecting the adequacy of the depreciation provision, which was embodied in previous annual reports, and which qualification would have been necessary by the requirements of the New York Curb Exchange, on which the common stock of your Company is listed.

The Company is involved in litigation with the State of Mississippi over an attempt to assess taxes for prior years. The officers of your Company contend that during this period it was exempt, and this position is supported by the opinion of able counsel. There is also pending a proposed assessment of additional federal income taxes for prior years which is being contested. If the maximum loss is sustained under the above claims it would practically extinguish the earned surplus at December 31, 1933, as no provision has been made in the accounts for this contingency.

The accounts of the Company for the year 1933 have been audited by Will A. Clader, certified public accountant of Philadelphia, the independent auditor selected for this purpose by the Board of Directors. The auditor's report is printed on page 7.

In order that 1932 be truly comparable with 1933, the figures as reported in the 1932 annual report have been amended in the accompanying comparative income account to reflect the adjustments made in 1933 of the income for the year 1932.

This report is solely for information for stockholders and is not a representation, prospectus, or circular in re-

spect of any stock of any corporation, and is not transmitted in connection with any contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security.

By order of the Board of Directors.

Milton S. Binswanger, President.

Dover, Delaware, May 25, 1934.

[fol. 708-4] MEMPHIS NATURAL GAS COMPANY
(A Delaware Corporation)

Balance Sheet—December 31, 1933

Assets and Deferred Charges

Property, plant and equipment	$7,898,597.50†	
Less reserve for depreciation	1,449,566.76	
		$6,449,030.74
Cash deposit held by Trustee of mortgage bonds for sinking fund		67,394.15
Amount deposited in trust account at the National Bank of Commerce in Memphis, under contract providing that same be held as collateral to a loan to the Bank of Commerce & Trust Company from Reconstruction Finance Corporation. This amount bears no interest and is repayable only after indebtedness to Reconstruction Finance Corporation is fully paid		12,500.00
Current assets		
Cash (on deposit with banks subject to cheque)	$ 490,332.92	
Cash deposited for bond interest and dividend payments	28,873.00	
Accounts receivable	233,779.70	
Materials and supplies (as certified by officials of the company as to quantities)	17,377.48	
		770,363.10
Deferred charges		
Prepaid insurance	$ 3,836.08	
Bond discount and expense in process of amortization	43,645.05	
Other expenses in process of amortization	20,230.01	
		67,711.14
		$7,366,999.13

† These figures represent cost, and do not purport to be realizable values or sums which could be realized upon the sale thereof. $320,000 of the property is subject to the lien of the first mortgage bonds of vendors.

[fol. 708-5]

Liabilities, Capital and Surplus

Capital stocks		
$7 cumulative preferred stock (Authorized 20,000 shares without par value. Redemption price and preference in liquidation $110 a share) 7636 shares outstanding	$ 687,240.00	
Common stock (Authorized 1,000,000 shares of $5 par value each) 918,680 shares outstanding	4,593,400.00	
		$5,280,640.00

Liabilities, Capital and Surplus—(Cont.)

Funded debt		
First mortgage 6% 5-year sinking fund bonds, due Jan. 1, 1937—outstanding*	$ 517,000.00	
6% purchase lien note, due Oct. 12, 1944 (secured by vendor's lien on 19.8589 miles of 6" pipe line)	120,000.00	
6% purchase lien note, final semi-annual payment due Nov. 1, 1943 (secured by vendor's lien on 22.25 miles of 8" pipe line)	166,444.16	
		803,444.16
Current liabilities		
Accounts payable	$ 75,818.47	
Interest on bonds, payable Jan. 1, 1934	15,510.00	
Dividend on preferred stock, payable Jan. 1, 1934	13,363.00	
		104,691.47
Accrued liabilities		
Taxes	$ 54,735.29	
Federal income tax (subject to review by the Government)	70,560.24	
Interest	3,264.44	
		128,559.97
Corporate surplus		
Paid in surplus	$ 801,680.39	
Earned surplus	247,983.14	
		1,049,663.53
		$7,366,999.13

* Includes $43,000 called for redemption on January 1, 1934, by operation of the sinking fund.

Refer to accompanying letter of the president for contingent liability with respect to Mississippi taxes and federal income taxes, for which no provision has been made.

[fol. 708-6] MEMPHIS NATURAL GAS COMPANY

Income Account	1933	1932
Gross revenues		
Operating	$1,594,667.90	$1,656,552.86
Non-operating	6,289.63	7,652.43
	$1,600,957.53	$1,664,205.29
Expenses		
Gas purchased	$ 524,901.64	$ 554,928.20
Other expenses and maintenance	204,972.77	197,484.54
Taxes—general	67,471.07	50,134.03
Federal income tax (provision)	60,000.00	62,157.06
	$ 857,345.48	$ 864,703.83
Gross income	$ 743,612.05	$ 799,501.46
Deductions		
Interest	$ 49,323.56	$ 65,454.01
Amortization of bond discount and expense	23,192.74	31,551.71
Amortization of organization expenses	1,005.97	1,813.00
Provision for depreciation	313,000.00	312,500.00
	$ 386,522.27	$ 411,318.72
Net income	$ 357,089.78	$ 388,182.74
Less dividend on preferred stock	53,466.00	56,883.75
Balance	$ 303,623.78	$ 331,298.99

Note.—The 1932 income account reflects the following adjustments charged in 1933 to surplus: additional depreciation $112,500; additional federal income tax $4,557.06; amortization of organization expenses $1,813; total $118,870.06.

Memphis Natural Gas Company

Surplus Account

		1933	1932
Earned surplus at beginning of year		$484,037.15	$153,233.60†
Less—			
Adjustments of 1932 income	$118,870.06§		
Adjustments of 1929-1931 income	424,736.73‡		424,736.73
		543,606.79	
Earned surplus (adjusted)		$ *59,569.46**	$*271,503.13**
Addition to surplus			
Profit on retirement of preferred stock by sinking fund requirement		3,929.00§	18,436.50
Net income for year, after payment of dividends on preferred stock		303,623.78‡	331,298.99
			$ 78,232.36
Less—dividends on common stock			137,802.00
Earned surplus at end of year		$247,983.14	$ *59,569.64**

* Deficit.

† As adjusted in 1932 report.

‡ Additional depreciation $418,200; amortization of organization expenses $5,439; miscellaneous $1,097.73.

§ Details given in the accompanying income account.

Accountant's Report

To the Board of Directors of
Memphis Natural Gas Company:

As accountant elected by the Board of Directors, we have made an examination of the balance sheet of Memphis Natural Gas Company (a Delaware corporation) as at December 31, 1933, and of the income account and statement of surplus for the year 1933. In connection therewith, we examined accounting records of the company and other supporting evidence and obtained information and explanations from the officers and employees of the company; we also made a general review of the accounting methods and of the operating and income accounts for the year.

In our opinion, based upon such examination, the provision for depreciation is reasonable, and the accompanying balance sheet and related income account and statement of surplus fairly present, in accordance with accepted principles of accounting consistently maintained by the company during the period under review, its financial position at December 31, 1933, and the results of operations for the year.

We have read the minutes submitted to us of the stockholders' and the Board of Directors' meetings during the period under review and we report that, in our opinion, the financial statements submitted herewith are not inconsistent with such minutes.

Will A. Clader
Certified Public Accountant
Member American Institute of Accountants

Philadelphia, Pa.
March 15, 1934

[fol. 709] EXHIBIT C(3) TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Sixth Annual Report for the Year 1934

[fol. 709-1] Memphis Natural Gas Company

Directors

John C. Adams	M. S. Binswanger
W. P. Armstrong	Marshall Eskridge
Carl F. Bauman	Birger L. Johnson

John J. Klise

Officers

Milton S. Binswanger	Chairman of the Board
Birger L. Johnson	President
John J. Klise	Vice President
Patrick D. Koontz	Vice President
Harry B. Lambert	Vice President
Henry C. Wallace	Vice President
Frank R. Hurlbutt	Secretary
Carl F. Bauman	Treasurer
H. P. Scott	Assistant Treasurer

Offices

Operating Office Sterick Building, Memphis, Tenn.
Transfer Agent Suite 3301—50 Broadway, New York, N. Y.

[fol. 709-2] Memphis Natural Gas Company

To the Shareholders:

The Board of Directors submits herewith a report of the operations of Memphis Natural Gas Company for the year ended December 31, 1934, together with a statement of the finances and property at the close of that year.

The accounts show a net income of $227,505.52 in 1934 after the payment of preferred stock dividends, as compared with $303,623.78 in 1933. The amounts paid on account of Mississippi taxes and extraordinary maintenance and the reserves for extraordinary maintenance and additional depreciation account for the decrease in net earnings in 1934.

The period during which your Company claimed exemption from assessment of Mississippi taxes expired at the end of 1933, consequently your Company paid $55,000 in taxes to the State of Mississippi in 1934, this being the first year in which such taxes have been paid.

During the year 1934 an extensive survey of your Company's pipe line was made to determine the extent of corrosion from soil conditions. Corrosion was found and it was necessary to expend during the year for extraordinary maintenance the sum of $12,656 to replace corroded pipe, and it is contemplated that it will be necessary to expend during the year 1935 approximately $115,000 for similar purposes. Faced with this situation a reserve of $50,000 was set up during 1934 for extraordinary maintenance which amount is directly chargeable against the income.

Provision for depreciation or amortization of the investment in pipe line, equipment and facilities is made in the accounts on the basis of the expected useful economic life of the property as measured by the estimated available gas supply. The amount charged to income in 1934 was $331,700, an increase of $18,700 over 1933. The aggregate provision conforms to the allowance claimed in the income tax returns.

Your Company purchases all of its gas in Louisiana under a contract which runs primarily to January 1, 1944 but provides for an extension (up to January 1, 1954) upon the same terms and conditions (except as to price) if and so [fol. 709-3] long as the seller has natural gas available for sale to your Company. Beginning January 1, 1935 the price to be paid for gas under this contract increases each three years for the balance of the primary term of this contract. This will add approximately $100,000 annually to the cost of gas purchased (on the basis of present sales) for the current three year period, an additional $100,000 annually for the second three year period, and an additional $100,000 annually for the third three year period. If the contract is extended the price beginning January 1, 1944 is to be fixed by mutual agreement between the seller and buyer or by arbitration.

There is no relative increase in the price to be received by your Company for the sale of this gas, most of which is sold to Memphis Power & Light Company in Memphis, Tennessee, under one or the other of two contracts, one of which absolutely expires on January 1, 1944 (power house con-

tract) and the other of which primarily expires on the same date but provides for an extension (up to January 1, 1954) upon the same terms and conditions (except as to price) if and so long as your Company has gas available for sale thereunder (city and county delivery contract).

In view of this contract situation which will result in a progressive increase in the cost of gas and a corresponding decrease in net income, your attention is particularly called to the table on pages 10 and 11 of the accompanying report showing the percentage of all purchased gas which is sold to Memphis Power & Light Company under the two contracts referred to above and in said table.

The sinking fund requirement of $150,000 yearly in cash or bonds at par has been fully met. The Company used $150,845 during the year for this purpose. With the $67,000 in the sinking fund at the beginning of the year and the deposit during the year, $147,000 principal amount of bonds were retired during the year and $70,000 principal amount were called for redemption on January 1, 1935.

Your Company expended $35,216.50 during the year for the sinking fund requirement of the preferred stock by retiring 382 shares. Dividends on the preferred stock have been regularly declared and are fully paid.

Litigation with the State of Mississippi over an attempt to assess taxes for prior years is still pending. You were informed in the 1933 report that the officers of your Company contend that during the period from January 1, 1929 [fol. 709-4] to January 1, 1934 it was exempt from assessment of certain Mississippi taxes, and this position is supported by the opinion of able counsel. The apportionment to tax districts of the total assessed value for 1934 has been attacked, which will increase the taxes paid for 1934 if the position of the taxing authorities is sustained. There is also pending a proposed assessment of additional federal income taxes for 1931 which is being contested. If the maximum loss is sustained under the above claims it would practically extinguish the earned surplus at December 31, 1934, as no provision has been made in the accounts for these contingencies. Owing to the various issues involved the final liability, if any, on account of these contingencies cannot at this time be estimated. The asserted liability for 1930 income tax which was pending last year has been cancelled by the Government.

The accounts of your Company for the year 1934 have been audited by Will-A. Clader, certified public accountant of Philadelphia, the independent accountant selected for the purpose by the Board of Directors, who has audited the accounts since the organization of the Company. The accountant's report is printed on page 12.

By order of the Board of Directors.

Birger L. Johnson, President.

Dover, Delaware, May 7, 1935.

Note: This report is solely for the information of stockholders and is not a representation, prospectus, or circular in respect of any stock of any corporation, and is not transmitted in connection with any contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security.

[fol. 709-5]

Memphis Natural Gas Company
(A Delaware Corporation)

Balance Sheet—December 31, 1934

Assets and Deferred Charges

Property, plant and equipment	$7,881,051.79*	
Less reserve for depreciation	1,831,613.84	
		$6,049,437.95
Cash deposit held by Trustee of mortgage bonds for sinking fund		70,350.00
Amount deposited in trust account at the National Bank of Commerce in Memphis, under contract providing that same be held as collateral to a loan to the Bank of Commerce & Trust Company from Reconstruction Finance Corporation. This amount bears no interest and is repayable only after indebtedness to Reconstruction Finance Corporation is fully paid		12,500.00
Current assets		
Cash (on deposit with banks subject to cheque)	$ 865,661.21	
Cash deposited for bond interest and dividend payments	23,794.50	
Accounts receivable	265,845.67	
Materials and supplies (as certified by officials of the company as to quantities)	19,109.72	
		1,174,411.10
Deferred charges		
Prepaid insurance	$ 1,932.29	
Bond discount and expense in process of amortization	20,823.00	
Other expenses in process of amortization	34,875.17	
		57,630.46
		$7,364,329.51

* These figures represent cost, and do not purport to be present realizable values.

Property which cost $120,000 is subject to the lien of the first mortgage bonds of the company's vendor, and property which cost $320,000 (including said $120,000) is subject to vendor's liens of $273,869.69.

[fol. 709-6] Liabilities, Capital and Surplus

Capital stocks		
$7 cumulative preferred stock (Authorized 20,000 shares without par value. Redemption price and preference in liquidation $110 a share)		
7,254 shares outstanding*	$ 652,680.00	
Common stock (Authorized 1,000,000 shares of $5 par value each)		
918,680 shares outstanding	4,593,400.00	
		$5,246,260.00
Funded debt		
First mortgage 6% 5-year sinking fund bonds, due Jan. 1, 1937—outstanding†	$ 370,000.00	
6% purchase lien note, due Oct. 12, 1944 (secured by vendor's lien on 19.8589 miles of 6" pipe line)	120,000.00	
6% purchase lien note, final semi-annual payment due Nov. 1, 1943 (secured by vendor's lien on 22.25 miles of 8" pipe line)	153,869.69	
		643,869.69
Current liabilities		
Accounts payable	$ 92,177.60	
Interest on bonds, payable Jan. 1, 1935	11,100.00	
Dividend on preferred stock, payable Jan. 1, 1935	12,694.50	
		115,972.10
Accrued liabilities		
Taxes	$ 113,644.74	
Federal income tax (subject to review by the Government)	56,979.73	
Interest	3,138.70	
		173,763.17
Corporate surplus		
Paid in surplus	$ 801,680.39	
Earned surplus	382,784.16	
		1,184,464.55
		$7,364,329.51

* 2,746 shares were acquired pursuant to sinking fund requirements and cancelled. The aggregate cash expenditure was $236,218.50, a resultant profit of $10,921.50, which is included in the earned surplus.

† Includes $70,000 called for redemption on January 1, 1935, by operation of the sinking fund.

Refer to accompanying letter of the president for contingent liability with respect to Mississippi taxes and federal income taxes, for which no provision has been made.

[fol. 709-7] Memphis Natural Gas Company

Income Account

	1934	1933
Gross revenues		
Operating	$1,726,392.20	$1,594,667.90
Non-operating	7,199.26	6,289.63
	$1,733,591.46	$1,600,957.53
Expenses		
Gas purchased	$ 598,955.53	$ 524,901.64
Maintenance	46,760.26	34,821.29
Transmission system operation	65,224.05	61,171.11
General and administrative	83,263.38	64,132.06
Management	47,341.00	44,848.31
Taxes	103,181.90	67,471.07
Federal income tax (provision)	56,000.00	60,000.00
Provision for depreciation	331,700.00	313,000.00
Extraordinary maintenance reserve	50,000.00	.....
	$1,382,426.12	$1,170,345.48
Gross income	$ 351,165.34	$ 430,612.05
Deductions		
Interest	$ 42,808.27	$ 49,323.56
Amortization of bond discount and expense	23,747.05	23,192.74
Amortization of organization expenses	5,343.00	1,005.97
	$ 71,898.32	$ 73,522.27
Net income	$ 279,267.02	$ 357,089.78
Less dividend on preferred stock	51,761.50	53,466.00
Balance (to the surplus account)	$ 227,505.52	$ 303,623.78

[fol. 709-8] Memphis Natural Gas Company

Surplus Account

	1934	1933
Earned surplus at beginning of year	$247,983.14	$ *59,569.64**
Additions to surplus		
Net income for year, after payment of dividends on preferred stock	227,505.52	303,623.78
Profit on retirement of preferred stock by sinking fund requirement	*836.30*†	3,929.00‡
	$474,652.16	$247,983.14
Less—dividends on common stock	91,868.00	.....
Earned surplus at end of year	$382,784.16	$247,893.14

* Deficit.

† Cost in excess of $90 a share.

‡ This is the amount of capital contribution of $90 a share in excess of cost of retirement.

[fols. 709-9-709-10]

Memphis Natural Gas Company

Comparative Income Account

Year	Gross revenues	Operating expenses and taxes	Depreciation	Interest	Other deductions	Net income	Dividends — $7 Preferred stock	Dividends — Common stock	Yearly surplus income
1928							$ 12,446		$ *12,446**
1929	$ 1,086,460	$ 568,208	$ 262,500	$422,988	$ 1,813	$ *169,050**	70,000		*239,050**
1930	1,571,057	755,680	270,600	198,784	1,813	344,180	67,375	$ 230,060	46,805
1931	1,593,551	735,747	285,100	14,142	1,813	556,749	61,152	551,802	*56,205**
1932	1,664,205	864,704	312,500	97,006	1,813	388,183	56,884	137,802	193,497
1933	1,600,958	857,346	313,000	72,516	1,006	357,090	53,466		303,624
1934	1,733,591	1,000,726	331,700	66,555	55,343	279,267	51,761	91,868	135,638
Total	$9,249,822	$4,782,411	$1,775,400	$871,991	$63,601	$1,756,419	$373,084	$1,011,472	$371,863

* Denotes deficit.

The above table reflects the adjustments of income in the years 1929-1932 as explained in the 1933 annual report and the adjustments in the annual reports for the years 1930-1931.

Profit from retirement of 2,746 shares of preferred stock	10,921
Earned surplus balance December 31, 1934	382,784

Memphis Natural Gas Company

Gas Sales

Year	Total		Memphis Power & Light Company			
			—Power House Contract—		—City and County Delivery Contract—	
	Gross revenue from sale of gas	Per cent of revenue from Memphis P. & L. Co.	Revenue	Per cent of total revenue	Revenue	Per cent of total revenue
1929	$1,678,063	92.54	$570,454	52.91	$427,180	39.63
1930	1,556,934	84.66	592,991	38.09	725,078	46.57
1931	1,585,620	83.58	581,283	36.66	743,987	46.92
1932	1,656,553	83.24	554,720	33.49	824,207	49.75
1933	1,594,668	83.80	529,754	33.22	806,514	50.58
1934	1,726,392	81.47	479,688	27.78	926,838	53.69

Power House Contract

The power house contract mentioned in the above schedule required a reduction in the price of gas fixed by the contract whenever a reduction in the electric rates of Memphis Power & Light Company became effective prior to December 31, 1933. Such reduction occurred October 1, 1932, resulting in a lower sale price for gas for the last three months of 1932 and for 1933.

This contract also required that after 1933 the sale price of gas thereunder should be on a comparable basis with the cost to Memphis Power & Light Company for other fuel. This resulted in a still lower sale price for gas in 1934. The price of gas will be affected in all future years by this factor. This contract expires January 1, 1944.

City and County Delivery Contract

The city and county delivery contract mentioned in the above schedule contains base rates for sale of gas to Memphis Power & Light Company for certain specified uses. The total revenue from the sale of gas under this contract is subject to an annual adjustment to equalize the profits or losses of both parties as calculated by a complicated formula prescribed in the contract. The effect of such adjustment, which is made by the payment of cash by the proper party, is to increase or decrease the revenue to Memphis Natural Gas Company from the sale of gas under this contract.

[fol. 709-11]

Will-A. Clader
Certified Public Accountant
Accountants and Auditors
Packard Building, Philadelphia

March 28, 1935.

Accountant's Report

To the Board of Directors of Memphis Natural Gas Company:

We have made an examination of the balance sheet of Memphis Natural Gas Company (a Delaware corporation) as at December 31, 1934, and of the statement of income and surplus for the year 1934. In connection therewith, we examined accounting records of the company and other supporting evidence and obtained information and explanations from officers and employees of the company; we also made a general review of the accounting methods and of the operating and income accounts for the year, but we did not make a detailed audit of the transactions.

In our opinion, based upon such examination, the provision for depreciation is reasonable, and the accompanying balance sheet and related statement of income and surplus fairly present, in accordance with accepted principles of accounting consistently maintained by the company during the year under review, its position at December 31, 1934, and the results of its operations for the year.

We have read the minutes submitted to us of the stockholders' and the Board of Directors' meetings during the year under review and we report that, in our opinion, the financial statements submitted herewith are not inconsistent with such minutes.

Will-A. Clader, Certified Public Accountant, Member American Institute of Accountants.

[fol. 710] EXHIBIT C(4) TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Seventh Annual Report for the Year 1935

[fol. 710-1] Memphis Natural Gas Company

Directors

John C. Adams	M. S. Binswanger
W. P. Armstrong	Marshall Eskridge
Carl F. Bauman	Birger L. Johnson
John J. Klise	

Officers

Milton S. Binswanger	Chairman of the Board
Birger L. Johnson	President
John J. Klise	Vice President
Patrick D. Koontz	Vice President
Harry B. Lambert	Vice President
Henry C. Wallace	Vice President
Frank R. Hurlbutt	Secretary
Carl F. Bauman	Treasurer
H. P. Scott	Assistant Treasurer

Offices

Operating Office	Sterick Building, Memphis, Tenn.
Transfer Agent	Suite 3301—50 Broadway, New York, N. Y.

[fol. 710-2] Memphis Natural Gas Company

To the Shareholders:

The Board of Directors submits herewith the annual report of Memphis Natural Gas Company for the year 1935.

The accounts show a net income of $201,836.25 in 1935 after the payment of preferred stock dividends, as compared with $227,505.52 in 1934. The amounts paid for recoating a portion of the 18 inch pipe line, the additional depreciation provision, and the increase in the price paid for gas effective January 1, 1935, which was explained in the 1934 report, account for the decrease in net earnings in 1935.

The increase in revenues from the sale of gas was 15.46%, and the increase in the quantity of gas sold in thousand

cubic feet was 20.21%, as compared with the previous year. The increase in the total amount paid for gas purchased was 34.71%. The cost price of gas per thousand cubic feet increased 11.57%.

An extensive survey of your Company's pipe line was made in 1934 to determine the extent of corrosion from soil conditions. Excessive corrosion was found in several sections and it was necessary to expend $132,804.40 in 1935 for recoating 22½ miles of pipe. A reserve of $50,000 was set up in 1934 for this expense and $82,804.40 was directly charged against the income of 1935. It is contemplated that it will be necessary to expend in 1936 approximately $80,000 for similar purposes.

Provision for depreciation or amortization of the investment in pipe line, equipment, and facilities is made in the accounts on the basis of the expected useful economic life of the property as measured by the estimated available gas supply. The amount charged to income in 1935 was $375,000, an increase of $43,300 over 1934 to cover insufficient accruals in prior years. The aggregate provision conforms to the allowance claimed in the amended income tax returns.

An important accomplishment during the year was the retirement of all the first mortgage bonds in the principal amount of $370,000 at a total cost of $371,850 for principal and premium, and the payment of the 6% purchase lien note in the remaining amount of $153,869.69.

Pursuant to the sinking fund requirement of the preferred stock, 403 shares were retired and cancelled in 1935 [fol. 710-3] at an expenditure of $36,316.75. Dividends on the preferred stock have been regularly declared and are fully paid.

Litigation with the State of Mississippi over an attempt to assess taxes for prior years is still pending. You were informed in the 1934 report that the officers of your Company contend that during the period from January 1, 1929 to January 1, 1934 it was exempt from assessment of certain Mississippi taxes. The case was decided by the United States Circuit Court of Appeals in February 1936. The State was awarded approximately $35,000 for levee taxes but $315,000 of the total tax claim was disallowed. The taxing authorities have intimated that they intend to appeal the case to the United States Supreme Court. Owing to the various issues involved the final liability, if any, on account of this contingency cannot be estimated at this time, so no provision has been made in the accounts for it. The

contention of the Company in respect of the apportionment to tax districts of the total assessed valuation in 1934, reference to which was made in the 1934 annual report, was sustained against the Mississippi taxing authorities in the decision of the Mississippi Supreme Court rendered in December 1935.

The asserted liability for 1931 income tax which was pending last year has been cancelled by the government. There are pending proposed assessments of a small amount of additional federal income taxes for 1932 and 1933 which are being contested, and which are amply covered by the tax reserve in the accounts.

It is the opinion of counsel for your Company that it is not affected by the provisions of the Public Utility Holding Company Act of 1935.

The accounts for the year 1935 have been audited by Will-A. Clader, certified public accountant of Philadelphia and New York, the independent accountant selected for the purpose by the Board of Directors, who has audited the accounts since the organization of the Company. The accountant's report is printed on page 5.

By Order of the Board of Directors.

Birger L. Johnson, President.

Dover, Delaware, April 28, 1936.

NOTE: This report is solely for the information of stockholders and is not a representation, prospectus, or circular in respect of any stock of any corporation, and is not transmitted in connection with any contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security.

[fol. 710-4]

Will-A. Clader

Certified Public Accountant

Accountants and Auditors

Packard Building, Philadelphia

March 28, 1936.

Accountant's Report

To the Board of Directors of Memphis Natural Gas Company:

We have made an examination of the balance sheet of Memphis Natural Gas Company (a Delaware corporation) as at December 31, 1935, and of the statement of income and surplus for the year 1935. In connection therewith,

we examined accounting records of the company and other supporting evidence and obtained information and explanations from officers and employees of the company; we also made a general review of the accounting methods and of the operating and income accounts for the year, but we did not make a detailed audit of the transactions.

In our opinion, based upon such examination, the provision for depreciation is reasonable, and the accompanying balance sheet and related statement of income and surplus fairly present, in accordance with accepted principles of accounting consistently maintained by the company during the year under review, its position at December 31, 1935, and the results of its operations for the year.

We have read the minutes submitted to us of the stockholders' and the Board of Directors' meetings during the year under review and we report that, in our opinion, the financial statements submitted herewith are not inconsistent with such minutes.

Will-A. Clader, Certified Public Accountant, Member American Institute of Accountants.

[fol. 710-5]

Memphis Natural Gas Company
(A Delaware Corporation)
Balance Sheet—December 31, 1935
Assets and Deferred Charges

Property, plant and equipment	$7,891,448.12(a)	
Less reserve for depreciation	2,155,820.77	
		$5,735,627.35
Amount deposited in trust account at the National Bank of Commerce in Memphis, under contract providing that same be held as collateral to a loan to the Bank of Commerce & Trust Company from Reconstruction Finance Corporation. This amount bears no interest and is repayable only after indebtedness to Reconstruction Finance Corporation is fully paid		10,000.00
Current assets		
Cash (on deposit with banks subject to cheque including $225,000 deposit subject to 30 days' notice to withdraw)	$ 776,824.63	
Cash deposited for dividend payable	11,989.25	
Accounts receivable	301,758.14	
Materials and supplies (as certified by officials of the company as to quantities)	24,360.92	
		1,114,932.94
Deferred charges		
Prepaid insurance	$ 416.84	
Organization and other expenses in process of amortization	25,000.00	
		25,416.84
		$6,885,977.13

(a) These figures represent cost, and do not purport to be present realizable values.

Property which cost $120,000 is subject to the lien of the first mortgage bonds of the company's vendor and to a vendor's lien of $120,000.

Capital stocks		
$7 cumulative preferred stock		
(Authorized 20,000 shares without par value. Redemption price and preference in liquidation $110 a share)		
6,851 shares outstanding(b)	$ 616,590.00	
Common stock		
(Authorized 1,000,000 shares of $5 par value each)		
918,680 shares outstanding	4,593,400.00	
		$5,209,990.00
6% purchase lien note, due Oct. 12, 1944 (secured by vendor's lien on 19.8589 miles of 6" pipe line)		120,000.00
Current liabilities		
Accounts payable	$ 153,634.65	
Dividend on preferred stock, payable Jan. 1, 1936	11,989.25	
		165,623.90
Accrued liabilities		
Taxes	$ 31,895.57	
Federal income tax (subject to review by the Government)	62,501.61	
Interest	1,580.00	
		95,977.18
Corporate surplus		
Paid in surplus	$ 801,680.39	
Earned surplus	492,705.66(b)	
		1,294,386.05
		$6,885,977.13

(b) 3,149 shares were acquired pursuant to sinking fund requirements and cancelled. The aggregate expenditure was $272,535.25, a resultant profit of $10,874.75, which is included in the earned surplus.

Refer to accompanying letter of the president for contingent liability with respect to Mississippi taxes, for which no provision has been made.

[fol. 710-7] Memphis Natural Gas Company

Income Account

	1935	1934
Gross revenues		
Operating	$1,993,403.90	$1,726,392.20
Non-operating	7,392.93	7,199.26
	$2,000,796.83	$1,733,591.46
Expenses		
Gas purchased	$ 806,854.93	$ 598,955.53
Maintenance	42,383.25	46,760.26
Transmission system operation	86,201.34	65,224.05
General and administrative	91,154.18	83,263.38
Management	53,602.65	47,341.00
Taxes	103,731.52	103,181.90
Federal income tax (provision)	60,000.00	56,000.00
Provision for depreciation	375,000.00	331,700.00
Extraordinary maintenance reserve(a)	82,804.40	50,000.00
	$1,701,732.27	$1,382,426.12
Gross income	$ 299,064.56	$ 351,165.34
Deductions		
Interest	$ 21,565.06	$ 42,808.27
Amortization of bond discount and expense on bonds outstanding during the year and expense of retiring bonds	22,673.00	23,747.05
Amortization of organization expenses	5,000.00	5,343.00
	$ 49,238.06	$ 71,898.32
Net income	$ 249,826.50	$ 279,267.02
Less dividends on preferred stock	47,990.25	51,761.50
Balance (to the surplus account)	$ 201,836.25	$ 227,505.52

(a) In 1935 $132,804.40 was expended for recoating approximately 22½ miles of pipe line.

[fol. 710-8] Memphis Natural Gas Company

Surplus Account

	1935	1934
Earned surplus at beginning of year	$ 382,784.16	$ 247,983.14
Net income for year, after payment of dividends on preferred stock	201,836.25	227,505.52
	$ 584,620.41	$ 475,488.66
Loss from retirement of preferred stock by sinking fund requirement	†46.75	†836.50
	$ 584,573.66	$ 474,652.16
Less—dividends on common stock	91,868.00	91,868.00
Earned surplus at end of year	$ 492,705.66	$ 382,784.16

* Includes $10,874.75 profit from retirement of preferred stock.

† Cost in excess of $90 a share.

Refer to note on balance sheet regarding contingent liability with respect to Mississippi taxes.

[fol. 710-9, 710-10]

Memphis Natural Gas Company

Comparative Income Account

Year	Gross revenues	Operating expenses and taxes	Depreciation	Interest	Extraordinary Maintenance reserve	Other deductions	Net Income	Dividends $7 Preferred stock	Dividends Common stock	Yearly surplus income
1928	.....	.....	.....	.....	.....	.....	.....	$ 12,446	.....	$ *12,446**
1929	$ 1,086,460	$ 568,208	$ 262,500	$422,988	.....	$ 1,813	$ *169,050**	70,000	.....	*239,050**
1930	1,571,057	755,680	270,600	198,784	.....	1,813	344,180	67,375	$ 230,000	46,805
1931	1,593,551	735,747	285,100	14,142	.....	1,812	556,749	61,152	551,802	*56,205**
1942	1,664,205	864,704	312,500	97,006	.....	1,813	388,183	56,884	137,802	193,497
1933	1,600,958	857,346	313,000	72,516	.....	1,006	357,090	53,466	.....	303,624
1934	1,733,591	1,000,726	331,700	66,555	$ 50,000	5,343	279,267	51,761	91,868	135,638
1935	2,000,796	1,243,928	375,000	44,238	82,804	5,000	249,826	47,990	91,868	109,968
Total	$11,250,618	$6,026,339	$2,150,400	$916,229	$132,804	$18,601	$2,006,245	$421,074	$1,103,340	$481,831
								Profit from retirement of 3,149 shares of preferred stock		10,875
								Earned surplus balance December 31, 1935		$492,706

* Denotes deficit.

The above table reflects the adjustments of income in the years 1929-1932 as explained in the 1933 annual report and the adjustments in the annual reports for the years 1930-1931.

Memphis Natural Gas Company

Gas Sales

Year	Total		Memphis Power & Light Company			
			Power House Contract		City and County Delivery Contract	
	Gross revenue from sale of gas	Per cent of revenue from Memphis P. & L. Co.	Revenue	Per cent of total revenue	Revenue	Per cent of total revenue
1929	$1,078,063	92.54	$570,454	52.91	$ 427,180	39.63
1930	1,556,934	84.66	592,991	38.09	725,078	46.57
1931	1,585,620	83.58	581,283	36.66	743,987	46.92
1932	1,656,553	83.24	554,720	33.49	824,207	49.75
1933	1,594,668	83.80	529,754	33.22	806,514	50.58
1934	1,726,392	81.47	479,688	27.78	926,838	53.69
1935	1,993,404	80.06	485,244	24.34	1,110,821	55.72

Power House Contract

The power house contract mentioned in the above schedule required a reduction in the price of gas fixed by the contract whenever a reduction in the electric rates of Memphis Power & Light Company became effective prior to December 31, 1933. Such reduction occurred October 1, 1932, resulting in a lower sale price for gas for the last three months of 1932 and for 1933.

This contract also required that after 1933 the sale price of gas thereunder should be on a comparable basis with the cost to Memphis Power & Light Company for other fuel. This resulted in a still lower sale price for gas in 1934 and 1935. The price of gas will be affected in all future years by this factor. This contract expires January 1, 1944.

City and County Delivery Contract

The city and county delivery contract mentioned in the above schedule contains base rates for sale of gas to Memphis Power & Light Company for certain specified uses. The total revenue from the sale of gas under this contract is subject to an annual adjustment to equalize the profits or losses of both parties as calculated by a complicated formula prescribed in the contract. The effect of such adjustment, which is made by the payment of cash by the proper party, is to increase or decrease the revenue to Memphis Natural Gas Company from the sale of gas under this contract.

[fol. 711] EXHIBIT C(5) TO TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Eighth Annual Report for the Year 1936

[fol. 711-1] Memphis Natural Gas Company

Directors

W. P. Armstrong
Carl F. Bauman
Milton S. Binswanger
Marshall Eskridge
Birger L. Johnson
John J. Klise
Alden T. Shotwell

Officers

Milton S. Binswanger	Chairman of the Board
Birger L. Johnson	President
John J. Klise	Vice President
Patrick D. Koontz	Vice President
Harry B. Lambert	Vice President
Henry C. Wallace	Vice President
Frank R, Hurlbutt	Secretary
Carl F. Bauman	Treasurer
A. Cooper Dearth	Assistant Treasurer

Offices

Operating Office ..... Sterick Building, Memphis, Tenn.
Transfer Agent Suite 3301—50 Broadway, New York, N. Y.

[fol. 711-2] Memphis Natural Gas Company

To the Shareholders:

The Board of Directors submits herewith the annual report of Memphis Natural Gas Company for the year 1936.

The year just closed was the eighth of your company's existence. It was a splendid year of growth for the Company.

The accounts show a net income of $472,865.42 in 1936 after the payment of preferred stock dividends, as compared with $201,836.25 in 1935.

The increase in revenues from the sale of gas was 19.89%, and the increase in the quantity of gas sold in thousand cubic feet was 22%, as compared with the pre-

vious year. The increase in the total amount paid for gas purchased was 17.04%. The average cost price of gas per thousand cubic feet decreased 4.38%.

Provision for depreciation or amortization of the investment in pipe lines, equipment, and facilities is made in the accounts on the basis of the expected useful economic life of the property as measured by the estimated available gas supply. The amount charged to income in 1936 was $340,000, a decrease of $35,000 over 1935 as the latter year covered insufficient accruals in prior years. The aggregate provision conforms to the allowance claimed in the amended income tax returns.

Pursuant to the sinking fund requirement of the preferred stock, 429 shares were retired and cancelled in 1936 at an expenditure of $45,004.05. Dividends on the preferred stock have been regularly dedicated and are fully paid.

Litigation with the State of Mississippi over an attempt to assess taxes for prior years was pending at the beginning of 1936. You were informed in the 1935 report that the officers of your Company contended that during the period from January 1, 1929, to January 1, 1934, it was exempt from assessment of certain Mississippi taxes. The case [fol. 711-3] was decided by the United States Circuit Court of Appeals in February, 1936. $315,000 of the total tax claim was disallowed, but the State was awarded $32,615.71 for levee tax. The taxing authorities appealed the case to the United States Supreme Court which sustained the lower court.

There are pending proposed assessments of a small amount of additional federal income taxes for the years 1932 to 1935, both inclusive, which are being contested, and which are amply covered by the tax reserve in the accounts.

Your company invested during the year in oil properties in Texas $524,835.84 of its depreciation reserve. The properties include an undivided one-half interest in an operating leasehold, containing thirty-three producing wells in Duval County, in the southwestern part of Texas. The present proration allowable is 990 barrels per day of which 495 barrels per day are assignable to the company's interest. There was also invested $470,000 of the depreciation reserve in notes of West Virginia Gas Corporation.

The accounts for the year 1936 have been audited by

Will-A. Clader, certified public accountant, the independent accountant selected for the purpose by the Board of Directors, who has audited the accounts since the organization of the Company. The accountant's report is printed on page 5.

By Order of the Board of Directors.

Birger L. Johnson, President.
Dover, Delaware, May 20, 1937.

Note: This report is solely for the information of stockholders and is not a representation, prospectus, or circular in respect of any stock of any corporation, and is not transmitted in connection with any contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security.

[fol. 711-4]

Will-A. Clader
Certified Public Accountant
Accountants and Auditors
Packard Building, Philadelphia

April 30, 1937.

Accountant's Report

To the Board of Directors of Memphis Natural Gas Company:

We have made an examination of the balance sheet of Memphis Natural Gas Company (a Delaware corporation) as at December 31, 1936, and of the statement of income and surplus for the year 1936. In connection therewith, we examined accounting records of the company and other supporting evidence and obtained information and explanations from officers and employees of the company; we also made a general review of the accounting methods and of the operating and income accounts for the year, but we did not make a detailed audit of the transactions.

In our opinion, based upon such examination, the provision for depreciation is reasonable, and the accompanying balance sheet and related statement of income and surplus fairly present, in accordance with accepted principles of accounting consistently maintained by the company during the year under review, its position at December 31, 1936, and the results of its operations for the year.

Will-A. Clader, Certified Public Accountant.

[fol. 711-5]

Memphis Natural Gas Company
(A Delaware Corporation)

Balance Sheet—December 31, 1936

Assets and Deferred Charges

Property, plant and equipment	$7,912,972.65(a)	
Less reserve for depreciation	2,496,731.87	
		$5,416,240.78
Investment in oil properties	$ 524,835.84	
Less reserve for depreciation and depletion	14,958.75	
		509,877.09
Investment in notes receivable of West Virginia Gas Corporation		470,000.00
Amount deposited in trust account at the National Bank of Commerce in Memphis, under contract providing that same be held as collateral to a loan to the Bank of Commerce & Trust Company from Reconstruction Finance Corporation. This amount bears no interest and is repayable only after indebtedness to Reconstruction Finance Corporation is fully paid		6,250.00
Current assets		
Cash (on deposit with banks subject to cheque including $50,000 deposit subject to notice to withdraw)	$ 142,296.32	
Cash deposited for dividend payable	11,238.50	
Notes receivable	8,000.00	
Accounts receivable	347,260.65	
Interest receivable	7,689.54	
Materials and supplies (as certified by officials of the company as to quantities)	11,530.67	
		528,015.68
Deferred charges		
Prepaid insurance	$ 3,540.86	
Organization and other expenses in process of amortization	24,430.00	
		27,970.86
		$6,958,354.41

(a) These figures represent cost, and do not purport to be present realizable values.

Property which cost $120,000 is subject to the lien of the first mortgage bonds of the company's vendor and to a vendor's lien of $120,000.

[fol. 711-6] Liabilities, Capital and Surplus

Capital stocks		
$7 cumulative preferred stock (Authorized 20,000 shares without par value. Redemption price and preference in liquidation $110 a share) 6,422 shares outstanding (b)	$ 577,980.00	
Common stock (Authorized 1,000,000 shares of $5 par value each) 918,680 shares outstanding	4,593,400.00	$5,171,380.00
6% purchase lien note, due Oct. 12, 1944 (secured by vendor's lien on 19.8589 miles of 6" pipe line)		120,000.00
Current liabilities		
Accounts payable	$ 193,615.85	
Dividend on preferred stock, payable Jan. 1, 1937	11,238.50	204,854.35
Accrued liabilities		
Taxes	$ 38,864.27	
Federal income tax and surtax on undistributed profits (subject to review by the Government)	120,158.37	
Interest	1,580.00	160,602.64
Corporate surplus		
Paid in surplus (c)	$ 801,680.39	
Earned surplus	499,837.03(b)	1,301,517.42
		$6,958,354.41

(b) 3,578 shares were acquired pursuant to sinking fund requirements and cancelled. The aggregate expenditure was $317,539.30, a resultant profit of $4,480.70, which is included in the earned surplus.

(c) Created by changing common stock without par value to common stock of the par value of $5. a share, less expense of retiring bonds in 1930.

Contingent Liability—Louisiana power tax $13,263.75, disputed by the company. Counsel for the company advised that it is not liable for this tax.

[fol. 711-7] Memphis Natural Gas Company

Income Account

	1936	1935
Gross revenues		
Operating	$2,389,943.27	$1,993,403.90
Non-operating(a)	22,900.69	7,392.93
Total	$2,412,843.96	$2,000,796.83
Expenses		
Gas purchased	$ 944,400.77	$ 806,854.93
Maintenance	89,579.11	42,383.25
Transmission system operation	112,166.79	86,201.34
General and administrative	84,634.28	91,154.18
Management	61,737.67	53,602.65
Taxes	120,915.21	103,731.52
Federal income tax (provision)	93,000.00	60,000.00
Surtax on undistributed profits (provision)	1,700.00	.....
Provision for depreciation	340,000.00	375,000.00
Extraordinary maintenance reserve(b)	.....	82,804.40
Total	$1,848,133.83	$1,701,732.27
Gross income	$ 564,710.13	$ 299,064.56
Deductions		
Interest	$ 7,275.00	$ 21,565.06
Amortization of bond discount and expense on bonds outstanding during the year and expense of retiring bonds	.....	22,673.00
Amortization of organization expenses	7,000.00	5,000.00
Mississippi levee taxes 1929-1933(c)	32,615.71	.....
Total	$ 46,890.71	$ 49,238.06
Net corporate income	$ 517,819.42	$ 249,826.50
Less dividends on preferred stock	44,954.00	47,990.25
Balance (to the surplus account)	$ 472,865.42	$ 201,836.25

(a) Includes $6,920.64 net revenue from oil operations from September 1, 1936.
(b) In 1935 $132,804.40 was expended for recoating approximately 22½ miles of pipe line.
(c) Refer to the accompanying letter of the president for explanation of this item.

[fol. 711-8] Memphis Natural Gas Company

Surplus Account

	1936	1935
Earned surplus at beginning of year	$ 492,705.66	$ 382,784.16
Net income for year, after payment of dividends on preferred stock	472,865.42	201,836.25
	$ 965,571.08	$ 584,620.41
Preferred stock retired, by sinking fund requirement, at a cost in excess of $90 a share capital contribution	6,394.05	46.75
	$ 959,177.03	$ 584,573.66
Less—dividends on common stock	459,340.00	91,868.00
Earned surplus at end of year	$ 499,837.03	$ 492,705.66

* Includes $4,480.70 profit from retirement of preferred stock.

[fol. 711-9, 711-10]

Memphis Natural Gas Company

Comparative Income Account

Year	Gross revenues	Operating expenses and taxes	Depreciation	Interest	Extraordinary Maintenance reserve	Other deductions	Net Income	Dividends: $7 Preferred stock	Dividends: Common stock	Yearly surplus income
1928	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
1929	$ 1,086,460	$ 568,208	$ 262,500	$422,988	.....	$ 1,813	$ *169,050**	$ 12,446	.....	$ *12,446**
1930	1,571,057	755,680	270,600	198,784	.....	1,813	344,180	70,000	.....	*239,050**
1931	1,593,551	735,747	285,100	14,142	.....	1,813	556,749	67,375	$ 230,000	46,805
1942	1,664,205	864,704	312,500	97,006	.....	1,813	388,183	61,152	551,802	*56,205**
1933	1,600,958	857,346	313,000	72,516	.....	1,006	357,090	56,884	137,802	193,497
1934	1,733,591	1,000,726	331,700	66,555	$ 50,000	5,343	279,267	53,466	.....	303,624
1935	2,000,796	1,243,928	375,000	44,238	82,804	5,000	249,826	51,761	91,868	135,638
1936	2,412,844	1,508,134	340,000	7,275	.....	39,616	517,819	47,990	91,868	109,968
Total	$13,663,462	$7,534,473	$2,490,400	$923,504	$132,804	$58,217	$2,524,064	44,954	459,340	13,525
								$466,928	$1,562,680	$495,356
								Profit from retirement of 3,578 shares of preferred stock.		4,481
								Earned surplus balance December 31, 1936		$499,837

* Denotes deficit.

The above table reflects the adjustments of income in the years 1929-19[illegible] as explained in the 1933 annual report and the adjustments in the annual reports for the years 1930-1931.

Memphis Natural Gas Company

Gas Sales

Year	Total		Memphis Power & Light Company			
			Power House Contract		City and County Delivery Contract	
	Gross revenue from sale of gas	Per cent of revenue from Memphis P. & L. Co.	Revenue	Per cent of total revenue	Revenue	Per cent of total revenue
1929	$1,078,063	92.54	$570,454	52.91	$ 427,180	39.63
1930	1,556,934	84.66	592,991	38.09	725,078	46.57
1931	1,585,620	83.58	581,283	36.66	743,987	46.92
1932	1,656,553	83.24	554,720	33.49	824,207	49.75
1933	1,594,668	83.80	529,754	33.22	806,514	50.58
1934	1,726,392	81.47	479,688	27.78	926,838	53.69
1935	1,993,404	80.06	485,244	24.34	1,110,821	55.72
1936	2,389,943	78.84	529,785	22.17	1,354,419	56.67

Power House Contract

The power house contract mentioned in the above schedule required a reduction in the price of gas fixed by the contract whenever a reduction in the electric rates of Memphis Power & Light Company became effective prior to December 31, 19 3. Such reduction occurred October 1, 1932, resulting in a lower sale price for gas thereafter.

This contract also required that after 1933 the sale price of gas thereunder should be on a comparable basis with the cost to Memphis Power & Light Company for other fuel. This resulted in a still lower sale price for gas since 1933. The price of gas in all future years is subject to this factor. This contract expires January 1, 1944.

City and County Delivery Contract

The city and county delivery contract mentioned in the above schedule contains base rates for sale of gas to Memphis Power & Light Company for certain specified uses. The total revenue from the sale of gas under this contract is subject to an annual adjustment to equalize the profits or losses of both parties as calculated by a complicated formula prescribed in the contract. The effect of such adjustment, which is made by the payment of cash by the proper party, is to increase or decrease the revenue to Memphis Natural Gas Company from the sale of gas under this contract.

[fol. 712]

EXHIBIT D TO
TESTIMONY OF M. S. BINSWANGER

Memphis Natural Gas Company

Payments of Common Stock Dividends

Year	No. Shares	Share Rate	Amount
1930	920,000	.25	$230,000.00
1931	920,000	.45	414,000.00
1931*	918,680	.15	137,802.00
1932	918,680	.15	137,802.00
1934	918,680	.10	91,868.00
1935	918,680	.10	91,868.00
1936	918,680	.50	459,340.00
1937	918,680	.60	551,208.00
1938	918,680	.45	413,406.00
			2,527,294.00

NOTE: No Common Dividends were paid in the years 1928, 1929 and 1933.

* Number of outstanding shares changed during the year 1931 due to purchase and retirement of 1,320 stock purchase warrants.

[fol. 713] AFFIDAVIT OF MILTON S. BINSWANGER

Milton S. Binswanger, having been duly sworn, states on oath as follows:

In the cause styled "Memphis Natural Gas Company vs. Lewis S. Pope, et al. No. 23,369, R. D. Chancery Court, Davidson County, Tennessee," in the taking of my deposition therein I was requested on cross-examination to file as exhibits to my deposition the annual contractual statements of the Memphis Natural Gas Company and the Memphis Power & Light Company, as provided by Sections 9 and 10 of the contract made Exhibit "A" to the deposition of Mr. Johnson taken in said cause. I have made a careful check of the office records of Memphis Natural Gas Company and have made every effort to locate extra copies of said statements. I find that the Company has in its possession only one extra copy of the annual statement, which extra copy relates to the year 1933. In the file of the Company are statements for each year, but they are a part of the permanent records of the Company and are the only copies available for the Company's permanent use, and [fol. 714] hence are not filed as a part of the record in this case.

Further Deponent Sayeth Not.

Milton S. Binswanger.

Subscribed and sworn to before me this 19th day of January, 1939. C. S. Land, Notary Public. My commission expires July 20, 1941. (Seal.)

[fol. 715]

EXHIBIT F TO
TESTIMONY OF M. S. BINSWANGER

Copy

Memphis Power & Light Company

W. N. Ford
Vice-Pres.—Ass't. Gen. Manager

Memphis, Tenn.
August 2, 1937.

Memphis Natural Gas Company,
Memphis, Tennessee.

Gentlemen:

This letter refers to the contractual agreement in effect between us dated the 24th day of May 1928 and relating to the supply by you and the purchase by us of gas for sale by us in Memphis.

It is agreed that our annual contractual settlements for the year 1934 and the year 1935 are closed and completed and that you are to pay us $102.48 in settlement for the contract year 1934 and $16,206.55 less $8,992.55 in adjustments mentioned below and included in our 1936 contractual settlement statement, or a net payment of $7,214.00 in settlement for the contract year 1935.

(1) Credit you with:

Plant Items:		
(a) Expenses in connection with selling preferred stock	$35,101.91	
(b) Street gas lighting system	14,672.90	
(c) Expenditures for replacements	274,920.44	
Total Plant Items	$324,695.25	
Adjustment of Return at 6.00%	$19,481.72	
Adjustment of Amortization at 4.296%	13,948.91	
Total Credit Adjustment		$33,430.63

(2) Debit you with:

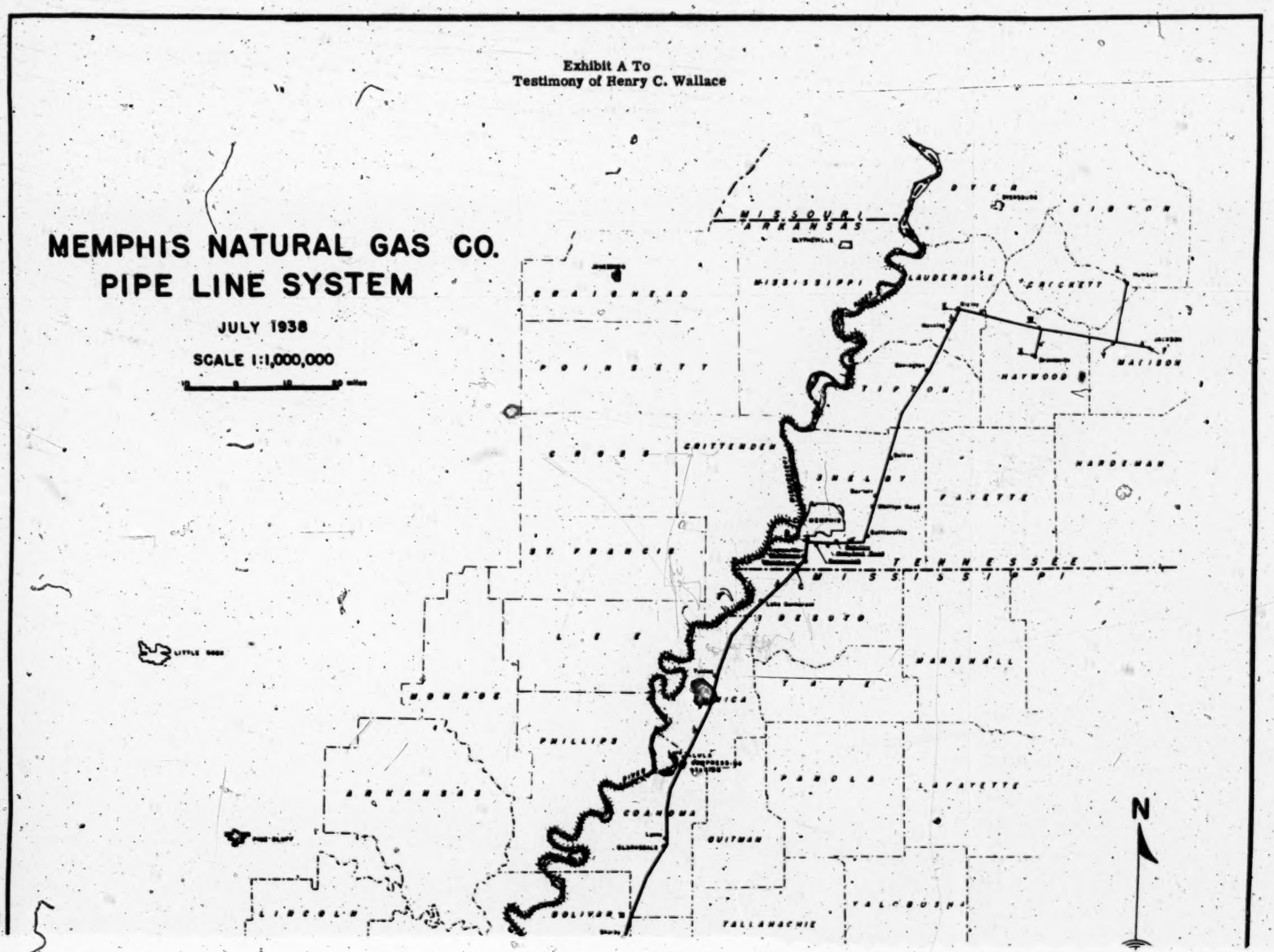
Adjustment of 1935 Renewal & Replacement charge.	$9,740.86	
Adjustment of 1935 Federal Income Tax	5,704.67	
Total Debit Adjustment		$15,445.53
Net credit adjustment to be given you in preparing 1936 contractual settlement statement for account of year 1935		$17,985.10
½ of $17,985.10, or		$ 8,992.55

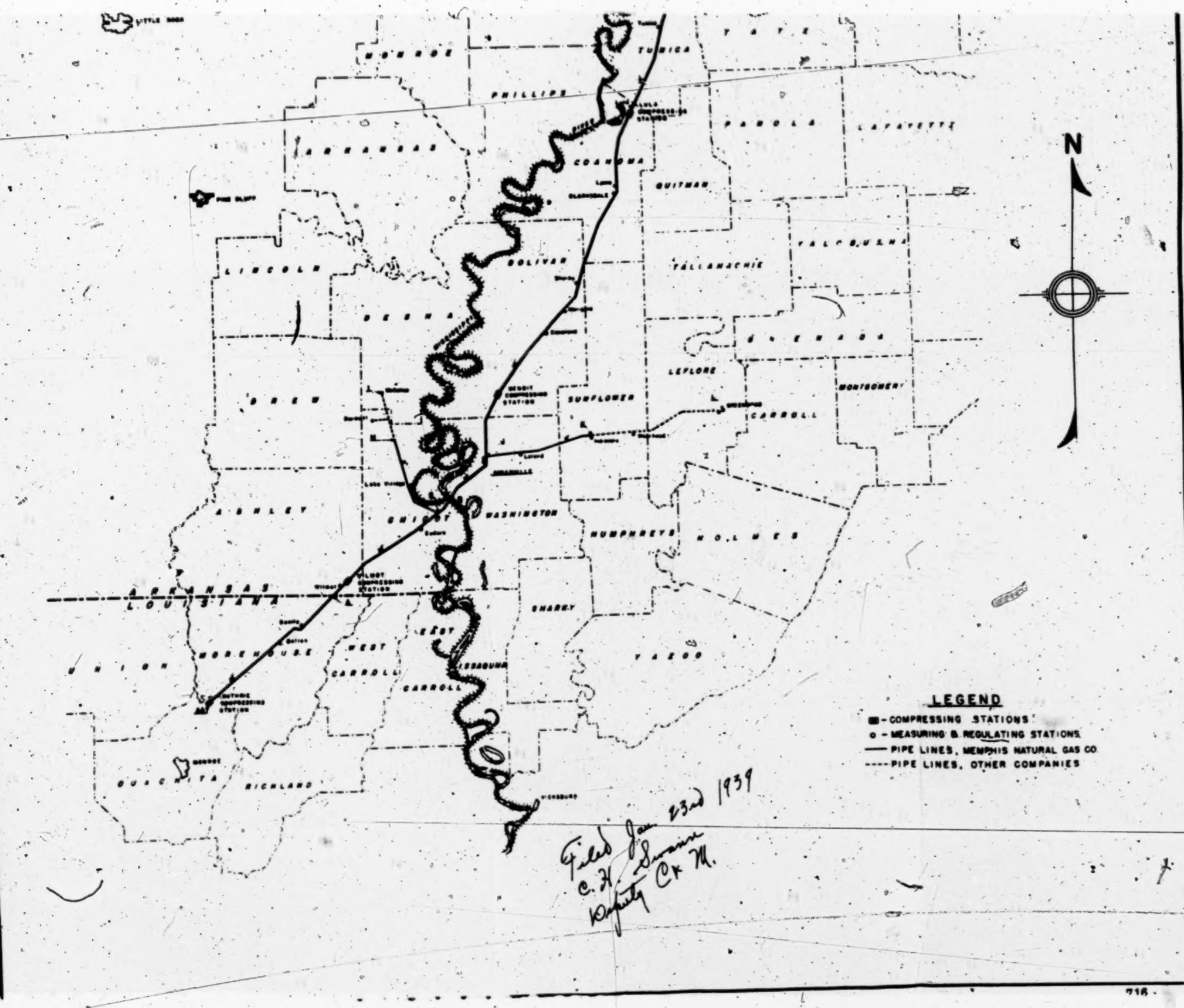
Memphis Power & Light Company
by W. N. Ford (Signed)
V-Pres. & Asst. Gen. Mgr.

The foregoing is correct
Memphis Natural Gas Company
Birger L. Johnson (Signed)
President

(Here follows 1 photolithograph, side folio 716)

Exhibit A To
Testimony of Henry C. Wallace




N
LEGEND
■ - COMPRESSING STATIONS
o - MEASURING & REGULATING STATIONS
—— PIPE LINES, MEMPHIS NATURAL GAS CO.
---- PIPE LINES, OTHER COMPANIES
Filed Jan 23rd 1939
C. H. Swaim
Deputy C & M.

[717] EXHIBIT B TO TESTIMONY OF HENRY C. WALLACE

Memphis Natural Gas Company

Pipe Line Mileage

	18"	10"	8"	6"	4"	3"
Louisiana	35.75	.....	.....	.....	.....	.....
Total	35.75	.....	.....	.....	.....	.....
Arkansas	31.27	.....	.....	19.85	.....	.....
Total	31.27	.....	.....	19.85	.....	.....
Mississippi	137.48	.....	22.25	.....	.....	.....
Total	137.48	.....	22.25	.....	.....	.....
Tennessee	6.90	*59.47	*39.50	*11.52	*5.17	*0.70
Total	6.90	59.47	39.50	11.52	5.17	0.70
Grand total.	211.40	59.47	61.75	31.37	5.17	0.70

* Total mileage West Tennessee Extension 116.36.
Total mileage Entire System 369.86.

[fol. 718] EXHIBIT X TO TESTIMONY OF HENRY C. WALLACE

Agreement Between Industrial Gas Company and Memphis Natural Gas Company

[fol. 718-1] Certificate

I, M. A. Phillips, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copy of an Agreement between Memphis Natural Gas Company and Industrial Gas Company, dated May 24, 1928, with the original executed Agreement and that the attached copy is a true and complete copy thereof.

In witness whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 20th day of May, 1938.

M. A. Phillips, Assistant Secretary. [Seal.]

[fol. 718-2] This Agreement made and entered into as of this 24th day of May, 1928, by and between Industrial Gas Company, a corporation organized and existing under the

laws of the State of Florida, hereinafter called the Seller, party of the first part, and Memphis Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the Buyer, party of the second part:

Whereas, the Seller desires to sell and deliver or to cause to be sold and delivered to the Buyer and the Buyer desires to purchase natural gas, as hereinafter provided;

Now, therefore, this agreement witnesseth: That the parties hereto in consideration of the covenants and payments herein set forth have covenanted and agreed, and do hereby covenant and agree as follows:

First: This agreement shall take effect if and when the agreement, dated as of May 24, 1928, between the Buyer and Memphis Power & Light Company shall take effect.

Second: The Seller agrees to sell and deliver or cause to be sold and delivered such amounts of natural gas as may be requisite to fulfill all contracts made by the Buyer for the sale of natural gas and the Buyer agrees to purchase, take and pay for such amounts up to the totals hereafter mentioned in this paragraph as may be requisite to fulfill all contracts made by the Buyer for the sale of natural gas—to-wit up to eight and one-half billion cubic feet during the first year after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, up to ten billion cubic feet during the second year after the date on which such pipe line is ready to receive natural gas, up to [fol. 718-3] eleven and one half billion cubic feet during the third year after the date on which such pipe line is ready to receive natural gas, up to thirteen billion cubic feet during the fourth year after the date on which such pipe line is ready to receive natural gas, up to fourteen and one half billion cubic feet during the fifth year after the date on which such pipe line is ready to receive natural gas, and up to sixteen billion cubic feet during the sixth (and each successive year thereafter during the continuance of this agreement) after the date on which such pipe line is ready to receive natural gas, and the Buyer shall also have the right to purchase, take and pay for, at the rates for natural gas herein set forth in Article Fifth, such additional amounts of natural gas over and above the respective totals above

set forth as may be requisite to fulfill all contracts made by the Buyer for the sale of natural gas. The Buyer shall take gas each hour in the day in accordance with the Buyer's market demands and at no time during any hour of the day shall the Buyer discontinue taking gas from the Seller, excepting in case of shut down on account of unavoidable accident. The Buyer further agrees that it will advise the Seller's representative as far in advance of changes in its demands as operating conditions will permit.

Provided, however, that the Seller shall not be obligated to sell and deliver or cause to be sold and delivered natural gas in excess of the amount it has currently available for delivery, as defined in Articles Seventh, Eighth and Ninth hereof.

Third: The Buyer agrees to construct and put in operation a pipe line to supply the natural gas requirements of its customers, including Memphis Power & Light Company, [fol. 718-4] with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours, which will be capable of expansion by the installation of additional compressor stations as marketing conditions may justify, from a site to be selected by the parties hereto at or near Fowler, Louisiana, hereinsometimes referred to as the place of delivery, to a point at or near the corporate limits of the City of Memphis, Tennessee, to be selected by the Buyer and Memphis Power & Light Company, if said pipe line runs through Arkansas or to a point to be so selected at or near Nonconnah Creek if said pipe line runs through Mississippi. The Buyer agrees to complete such pipe line at the time and in the manner set forth in the contract between the Buyer and Memphis Power & Light Company, dated May 24th, 1928. The Seller agrees to construct and install ready for operation the necessary connections on its pipe line system at the place of delivery to enable the Buyer to make connection with the pipe line system of the Seller.

Fourth: The place of delivery of the natural gas deliverable hereunder is at the said site at or near Fowler, Louisiana, and the Seller shall there furnish, install, operate and maintain at its own expense a regulating and measuring station properly equipped with orifice meters and recording gauges, or other type of meter or meters of

standard type as may be mutually agreed upon, the readings and/or records of which shall fix the total amount of natural gas delivered by the Seller to the Buyer.

The measuring equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property. The Buyer shall have access to said metering equipment at all reasonable times, but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes [fol. 718-5] or agents of the Seller. Charts and records from such metering equipment shall remain the property of the Seller. Upon request of the Buyer, the Seller will submit to the Buyer records and charts from its metering equipment, together with calculations therefrom, for the Buyer's inspection and verification, subject to return by the Buyer, within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by the Seller for the mutual use of both parties. At least twice each month, and on dates as near the first and sixteenth of the month as practicable, the Seller shall calibrate its meter in the presence of representatives of the Buyer and the parties shall jointly observe any adjustments which are made to the meter should such adjustments be necessary, and if the check meters hereinafter provided for have been installed, the same shall also be calibrated by the Buyer in the presence of representatives of the Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and [fol. 718-6] agreed upon, but in case the period is not

definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter, or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces gauge pressure above fourteen and sixty-five hundredths (14.65) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the [fol. 718-7] purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's Law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and sixty-five hundredths (14.65) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made

by standard apparatus and methods and at such time and places as, in accordance with good practice, may be agreed upon from time to time between the Seller and the Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16) of the month as practicable or as much oftener as if found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first fifteen (15) days of such calendar month or until changed by special [fol. 718-8] test, the special test to be applicable from the day made and through the following days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by special test, the special test to be applicable from the day made through the remaining days of such calendar month.

The Buyer may at its option and at its cost and expense install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the point of delivery as specified herein is on the premises of the Seller, the Seller grants to the Buyer the right of free use and ingress and egress to such metering equipment at all times for the purpose of installation, operation,

repair and/or removal. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but the Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of the Seller as to type and method of installation. In the event check metering equipment is installed by the Buyer, the Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of the charts shall be done only by employes or agents of the Buyer. Charts and records from said check metering equipment shall remain the property of the Buyer. Upon [fol. 718-9] request of the Seller, the Buyer shall submit to the Seller records and charts from said check metering equipment, together with calculations therefrom for the Seller's inspection and verification, subject to return by the Seller within ten (10) days after receipt thereof.

The Seller shall render to the Buyer, on or before the fifteenth (15th) of each month, a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller therefor at the rates for natural gas herein set forth in Article Fifth. The statements of deliveries so furnished by the Seller to the Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments then pending, unless exceptions thereto in writing shall be made by the Buyer within ten (10) days after it shall receive such statement.

Fifth. The Buyer shall pay the Seller monthly for gas purchased during the preceding calendar month at the following rate :

During each of the first 3 years after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, five (5¢) cents for each one thousand (1000) cubic feet of natural gas delivered to the Buyer at the point of delivery.

During each of the second 3 years after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, six (6¢) cents for each one thousand cubic feet

(1000 cu. ft.) of natural gas delivered to the Buyer at the point of delivery.

[fol. 718-10] During each of the third 3 years after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, seven (7¢) cents for each one thousand (1000) cubic feet of natural gas delivered to the Buyer at the point of delivery.

During each of the fourth 3 years after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, eight (8) cents for each one thousand (1000) cubic feet of natural gas delivered to the Buyer at the point of delivery.

During each of the fifth 3 years after the date on which the natural gas pipe line to be built by the Buyer from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas, nine (9¢) cents for each one thousand (1000) cubic feet of natural gas delivered to the Buyer at the point of delivery.

The above rates are based on the present gas severance tax imposed under the existing laws of the State of Louisiana and in case of any increase or decrease in the amount of such severance tax hereafter made by the Legislature of Louisiana, the foregoing rates shall be accordingly increased or decreased as the case may be.

[fol. 718-11] Sixth. The Buyer agrees to pay the Seller at its office in Bastrop, Louisiana, on or before the twenty-fifth (25th) of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent (6%) per annum from the date when such amount was due to the date of payment.

Seventh. Seller agrees that at the date when deliveries of gas hereunder are required to begin, Seller will own lands and gas leases and/or will have gas purchase contracts with the owners of lands and/or gas leases, covering 35,000 acres of land in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, within what is commonly known as the

proven gas areas of the Monroe Gas Field and the Richland Gas Field and the Seller represents that the requirements of all present contracts of the Seller having any priority or preference above the obligations hereunder do not exceed 10,000,000 cubic feet of gas per day.

The Seller agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption of supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure, or shortage of production of gas wells or fields, breakage or accident to lines or equipment, fires, strikes, riots, floods, earthquakes, and other acts of whatever nature due to causes beyond its control, and interruptions by governmental or court orders. The Seller shall only be bound to furnish natural gas to the full extent that it may be able [fol. 718-12] to do so through the exercise of reasonable care and diligence in the procuring of natural gas from gas lands owned or controlled by it and/or from its gas purchase contracts, and in the transportation thereof through its lines to the point of delivery and at such pressure and for such period of time as natural gas is available. It is expressly agreed by the Buyer that the Seller may interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressing station equipment and machinery, but only for such time as may be reasonable or unavoidable, and the Seller shall give to the Buyer except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruption so as to inconvenience the Buyer and the other consumers of the Seller as little as possible. Nothing herein shall in any way abridge the right of the Seller at any time to sell, transport and deliver natural gas to others than the Buyer, or restrict or reserve the Seller's properties or any part of them for the exclusive benefit of this contract, but the Seller shall not give other contracts entered into subsequent to the date of this contract any priority or preference above the obligations hereunder. In case of shortage of gas and necessity for curtailment, delivery of gas quotas to the Buyer and such other customers to which the Seller may sell natural gas shall be on a pro rata basis; but Seller and Buyer agree that as to consumers supplied with gas by them or either of them the supply to patrons classified as domestic consumers shall be given preference over the supply to industrial users. For the purpose of this agreement,

any person, firm or corporation paying the regular domestic rate shall be deemed a domestic consumer.

[fol. 718-13] Eighth. It is understood that Seller purposes to obtain its natural gas for delivery hereunder from gas lands owned or controlled by it and/or from purchase contracts with owners of such lands in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, in the fields commonly known as the Monroe Gas Field and the Richland Gas Field, and Seller shall not be required to supply hereunder natural gas from any other source, but Seller shall have the right if it so elects to supply hereunder natural gas from other sources, provided such other natural gas is not substantially inferior in quality to the natural gas then being produced from said Monroe and/or Richland gas fields.

Ninth. The natural gas deliverable hereunder shall be natural gas produced in its natural state from the wells, except that the Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. The Seller is to tender delivery to the Buyer only of natural gas which is commercial in quality and condition and of an average gross heating value of not less than 950 b.t.u. per cubic foot.

The Seller shall construct, or cause to be constructed pipe lines of adequate diameter and such other installations as may be necessary to deliver to the Buyer the natural gas the Buyer is entitled to take at a discharge pressure in the delivering lines sufficient initially to make deliveries against a pressure of 200 pounds gauge per square inch in the Buyer's intake lines for so long as the natural pressure of the natural gas in the wells from which deliveries are made is sufficient to make delivery of natural gas against a pressure of 200 pounds gauge per square inch in Buyer's intake lines. If the natural pressure of the natural gas from the wells from which natural gas is delivered by or for the account of the Seller decreases to the extent that such natu-
[fol. 718-14] ral pressure is not sufficient to make delivery through said delivering lines of the required quantity of natural gas against a pressure of 200 pounds gauge per square inch, then the Seller shall deliver such natural gas or cause such natural gas to be delivered against a pressure of at least 100 pounds gauge per square inch and at as much higher pressure as can be effectively maintained by

the natural pressure of the natural gas from said wells, but if the natural pressure of the natural gas from said wells decreases to the extent that deliveries of the required quantity of natural gas against a pressure of 100 pounds gauge per square inch cannot be met by the natural pressure of the natural gas from said wells through said delivering lines, then the Seller will construct or cause to be constructed and operate or cause to be operated compressor stations and/or other facilities which will deliver natural gas as herein provided to the Buyer against a pressure of at least 100 pounds gauge per square inch in the Buyer's intake lines.

Tenth. This agreement shall continue for fifteen (15) years from the day when the Buyer's natural gas pipe line from the Monroe Field to Memphis, Tennessee, is ready to receive natural gas hereunder.

The Buyer agrees to give the Seller at least three (3) months notice of the day when its said pipe line will be ready to receive gas and the Buyer agrees to be ready to receive natural gas at the maturity of said notice.

If at the end of said period of fifteen (15) years hereinabove mentioned and referred to, the Seller has natural gas available to continue supplying the Buyer with gas, then this agreement shall be and it hereby is extended on all the terms and conditions as hereinabove set forth (except as to the price to be paid the Seller for the gas during the ex-[fol. 718-15] tension period) for a period of ten (10) years from and after the expiration of such fifteen (15) years, or if the Seller's gas supply is not sufficient for ten (10) years, then for such period less than ten (10) years during which the Seller has natural gas so available. The price to be paid the Seller for gas hereunder after the end of said first fifteen (15) years hereinabove mentioned shall be the then reasonable price therefor and if not otherwise agreed to by the parties hereto at least six (6) months before the end of such fifteen (15) years, shall be determined by a Board of three arbitrators to be selected as follows: Either of the parties hereto may at any time after the beginning of such last mentioned period of six (6) months notify the other party hereto of the name of an arbitrator and if such other party shall fail within twenty (20) days to name a second arbitrator, then the party who first served the notice may on reasonable notice to the other party apply to the

person who is the Judge then senior in office of the District Court of the United States of America having jurisdiction for the Western District of Louisiana or any Federal Court of similar jurisdiction in said District for the appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties hereto may in like manner on reasonable notice to the other party apply to the person who is such Judge for the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as third arbitrator. The Board so constituted shall fix a reasonable time and place for the [fol. 718-16] hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the price thus to be paid for such gas.

The action of a majority of the members of such Board shall govern and their decision shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Eleventh. In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industral disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and people,

civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, sudden partial or entire failure of natural gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

[fol. 718-17] Twelfth. Unless otherwise provided, all notices to be given hereunder by the Seller to the Buyer shall be given by registered mail or by delivering the same to the Buyer at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Buyer for the purpose, and all notices to be given by the Buyer to the Seller shall be given by registered mail or by delivering the same to the Seller at its office at Bastrop, Louisiana, or at such other office as may be hereafter designated by the Seller for the purpose.

Thirteenth. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Whenever any corporation is referred to herein, such reference shall be deemed to include the successors and assigns of any such corporation.

Fourteenth. As between the parties hereto, the Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to the Buyer at the place of delivery, after which delivery the Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

In witness whereof, the parties hereto have caused this agreement to be duly signed by their respective officers as of the day and year first above mentioned.

Industrial Gas Company, by (signed) A. J. Priest, President. (Seal.)

Attest: By (signed) H. L. Martin, Ass't. Secretary.

Memphis Natural Gas Company, by (signed) Birger L. Johnson, Vice President. (Seal.)

Attest: By (signed) E. F. Berberich, Secretary.

[fol. 718-18] STATE OF NEW YORK,
County of New York, ss:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came A. J. Priest, to me known, who, being by me duly sworn, did depose and say that he resides in New York, N. Y.; that he is President of Industrial Gas Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) C. Henry Achenbach, Notary Public, Nassau County, Certificate filed in New York County, Clerk's No. 234, Register's No. 0-163, Commission expires March 30, 1930. (Seal.)

[fol. 718-19] STATE OF NEW YORK,
County of New York, ss:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came Birger L. Johnson, to me known, who, being by me duly sworn, did depose and say that he resides in New Rochelle, N. Y.; that he is Vice President of Memphis Natural Gas Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) McLane Tilton, III, Notary Public, N. Y. County No. 198, New York County Reg. No. 236. Commission Expires March 30, 1930. (Seal.)

[fol. 718-20] In consideration of the execution and delivery by Memphis Natural Gas Company of the foregoing agreement dated as of May 24th, 1928, between Industrial Gas Company and Memphis Natural Gas Company, the undersigned hereby guarantees the due and faithful performance by Industrial Gas Company of each and every of its covenants hereunder up to the time and only up to

the time when Industrial Gas Company shall own lands and gas leases and/or shall have gas purchase contracts with the owners of lands and/or gas leases, covering 35,000 acres of land in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, within what is commonly known as the proven gas areas of the Monroe Gas Field and the Richland Gas Field.

Electric Power & Light Corporation, by (signed) C. E. Groesbeck, President. (Seal.)

Attest: (signed) E. P. Summerson, Secretary.

[fol. 718-21] STATE OF NEW YORK,
County of New York, ss:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came C. E. Groesbeck, to me known, who, being by me duly sworn, did depose and say that he resides in New York, N. Y.; that he is President of Electric Power & Light Corporation, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) C. Henry Achenbach, Notary Public, Nassau County. Certificate filed in New York County Clerk's No. 234, Register's No. 0-163. Commission Expires March 30, 1930. (Seal.)

[fol. 718-22] I, H. L. Martin, Assistant Secretary of Electric Power & Light Corporation, hereby certify that the foregoing agreement is in the form or substantially in the form submitted to the meeting of the Executive Committee of Electric Power & Light Company held August 10th, 1928.

In Witness Whereof I have hereunto signed my name and affixed the seal of Electric Power & Light Corporation this 10th day of August, 1928.

(Signed) H. L. Martin, Assistant Secretary. (Seal.)

[fol. 718-23] I, H. L. Martin, Assistant Secretary of Industrial Gas Company, hereby certify that the foregoing agreement is in the form or substantially in the form sub-

mitted to the meeting of the Board of Directors of Industrial Gas Company held August 10th, 1928.

In Witness Whereof I have hereunto signed my name and affixed the seal of Industrial Gas Company this 10th day of August, 1928.

(Signed) H. L. Martin, Assistant Secretary. (Seal.)

[fol. 718-24] Certificate

I, A. C. Dearth, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copies of an Agreement between Memphis Natural Gas Company and United Gas Public Service Company, dated January 10, 1935 and November 27, 1935 with the original executed Letters of Agreement and that the attached copies are a true and complete copy thereof.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 11th day of November 1938.

A. C. Dearth, Assistant Secretary. (Corporate Seal, Memphis Natural Gas Company, Delaware.)

[fol. 718-25] Copy

January 10, 1935.

Memphis Natural Gas Company, Memphis, Tennessee.

GENTLEMEN:

Under date of May 24, 1928, Industrial Gas Company and your Company entered into an agreement (hereinafter referred to as the "Memphis Contract") whereby Industrial Gas Company agreed to sell and deliver or cause to be sold and delivered to your Company, and your Company agreed to purchase, receive and pay for certain quantities of natural gas at the times, in the amounts and under the terms and conditions set forth therein. The undersigned, United Gas Public Service Company, has succeeded to all of the rights and obligations of Industrial Gas Company under the Memphis Contract and is now delivering gas to you thereunder.

The undersigned hereby agrees with you that during the period of three years beginning January 10, 1935 all gas

taken by you under the Memphis Contract in excess of ten billion (10,000,000,000) cubic feet in any year shall be paid for by you at the price of five cents (5¢) per one thousand cubic feet (instead of at the price set forth in the Memphis Contract), provided, however, that said price shall be increased or decreased, as the case may be, in the amount of any increase or decrease in the amount of gas severance tax in effect under the laws of the State of Louisiana on May 24, 1928.

Except as modified hereby, the Memphis Contract shall continue and remain in force and effect for the full term thereof.

If the foregoing is acceptable to you, please so indicate in the space provided below, thereby constituting this an agreement between us.

Yours very truly, United Gas Public Service Company, by R. H. Hargrove, Vice-President.

Accepted.

Memphis Natural Gas Company, by Milton S. Binswanger, Chairman.

[fol. 718-26] Copy

November 27, 1935.

Memphis Natural Gas Company, Memphis, Tenn.

GENTLEMEN:

Under date of May 24, 1928, Industrial Gas Company and your Company entered into an Agreement (hereinafter referred to as the "Memphis Constr-ct") whereby Industrial Gas Company agreed to sell and deliver or cause to be sold and delivered to your Company and your Company agreed to purchase, receive and pay for certain quantities of natural gas under the terms and conditions set forth therein. The undersigned, United Gas Public Service Company has succeeded to all of the rights and obligations of Industrial Gas Company under the Memphis Contract and is now delivering gas to you thereunder.

Under date of January 10, 1935, the undersigned and your Company entered into an agreement whereby the undersigned agreed that during the period of three years beginning January 10, 1935, all gas taken by you under the Memphis Contract in excess of ten billion (10,000,000,000) cubic feet in any year shall be paid for by you at the price

of five cents (5¢) per one thousand cubic feet, instead of at the price set forth in the Memphis contract.

Under date of October 7, 1935, Memphis Power & Light Company (which purchases all of its requirements of gas from you) entered into a contract with Buckeye Cotton Oil Company for the sale to said Company of natural gas for boiler fuel in its plant at Memphis, Tennessee, for which you are paid a price of thirteen cents (13¢) per one thousand cubic feet.

While the contract between the Memphis Power & Light Company and the Buckeye Cotton Oil Company is dated October 7, 1935, deliveries under said contract shall be considered as having begun December 1, 1935. The undersigned agrees with you that if during any year of the three year period beginning December 1, 1935, and ending November 30, 1938, (which period comprises the time during which said contract between the Memphis Power & Light Company and the Buckeye Cotton Oil Company is effective, under said contract between said Companies), the total amount of gas taken by you under the Memphis contract (exclusive of the amount of gas delivered by the Memphis Power & Light Company to the Buckeye Cotton Oil Company during said year) is less than ten billion cubic feet of gas, then that amount of gas so sold and delivered to the Buckeye Cotton [fol. 718-27] Oil Company, during such year, which is necessary to make up any deficiency in said ten billion cubic feet of gas, shall be paid for by you at a price of six cents (6¢) for one thousand cubic feet, and the remainder of the gas so sold and delivered to the Buckeye Cotton Oil Company shall be paid for by you at the rate of five cents (5¢) per M.C.F. During any year of said three year period (from December 1, 1935 to November 30, 1938) in which you shall have taken under the Memphis Contract in excess of ten billion cubic feet of gas (exclusive of the amount of gas delivered by the Memphis Power & Light Company to the Buckeye Cotton Oil Company during such year) all gas so delivered to the Buckeye Cotton Oil Company shall be paid for by you at the price provided for at the rate of five cents (5¢) per M.C.F.

If you, the Memphis Natural Gas Company, receive for gas delivered the Buckeye Cotton Oil Company at any time during said three year period under the contract above referred to, more than thirteen cents (13¢) per M.C.F.,

then, in addition to the prices above provided to be paid to the undersigned, you are to pay the undersigned on each one thousand feet of gas delivered to the Buckeye Cotton Oil Company five-thirteenths (5/13ths) of the amount by which the price per one thousand cubic feet paid you for such gas in in excess of thirteen cents (13¢) per M.C.F.

In making monthly settlement with the undersigned for gas taken by you under the Memphis Contract, you shall pay the undersigned five cents (5¢) per one thousand cubic feet on all gas delivered by Memphis Power & Light Company to Buckeye Cotton Oil Company during the month for which settlement is made, and within thirty (30) days after the end of each year of said three year period, you shall pay the undersigned any additional amount that may be found to be due hereunder to the undersigned for such gas.

The prices hereinabove provided for shall be increased or decreased, as the case may be, in the amount of any increase or decrease, in the amount of gas severance tax in effect under the laws of the State of Louisiana on May 24, 1928.

Except as modified hereby, said Memphis Contract, as heretofore modified by said agreement between your Company and the undersigned dated January 10, 1935, shall continue and remain in full force and effect for the full term thereof.

[fol. 718-28] If the foregoing is acceptable to you, please so indicate in the space provided below, thereby constituting this an agreement between us.

Yours very truly, United Gas Public Service Company, by R. H. Hargrove, Vice-President.

Accepted.

Memphis Natural Gas Company, by Milton S. Binswanger, Chairman.

[fol. 719] EXHIBIT C TO TESTIMONY OF HENRY C. WALLACE

Schedule Showing Dates of Installation of Delivery Stations In Tennessee

Shelby County:		
Brooks Avenue	December	1928
Whitehaven-Capleville	October	1937

Shelby County:—(Cont.)		
Whitehaven	September	1930
Nonconnah	December	1937
Hollyford Road	October	1931
Oakville	September	1931
Collierville	October	1936
Whitten Road	January	1937
Bartlett	September	1937
Bolton	January	1937
Tipton County:		
Covington	October	1931
Lauderdale County:		
Henning	November	1931
Ripley	October	1931
Haywood County:		
Brownsville	September	1931
Gibson County:		
Humboldt	December	1931
Madison County:		
Jackson	September	1931

Exhibit "C"—Deposition of Henry C. Wallace.

[fol. 720] Exhibit D to Testimony of Henry C. Wallace

Certificate

I, A. C. Dearth, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copy of Agreement between Memphis Natural Gas Company and Commonwealth Management & Engineering Corporation, dated August 15th, 1933, with the original executed Agreement and that the attached copy is a true and complete copy thereof.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 22nd day of November, 1938.

A. C. Dearth, Assistant Secretary. (Corporate Seal, Memphis Natural Gas Company, Delaware.)

[fol. 720-1] This Agreement, made as of the 15th day of August, 1933, by and between Memphis Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware (hereinafter called the "Company"), party of the first part, and Commonwealth Management & Engineering Corporation, a corporation organized and existing under the laws of the State of West Virginia, (hereinafter called "Operating Manager"), party of the second part,

Witnesseth:

That, Whereas the Company, either directly or through its subsidiaries, is the owner of certain gas, oil and/or pipe line properties and desires that all such properties owned or controlled by it or which may be hereafter owned or controlled by it, should have their operations supervised and managed by a competent operating staff; and

Whereas, the Operating Manager is capable of fulfilling the requirements necessary for the careful and economical management of said properties:

Now, Therefore, in consideration of the premises and of the covenants herein set forth and other valuable considerations, it is agreed by and between the parties hereto as follows:

1. The Company employs the Operating Manager as general operating manager of its properties with authority, subject to the supervision and control of the Board of Directors of the Company, to direct, manage and operate such properties for the period hereinafter specified upon the terms and conditions hereinafter provided and the Operating Manager hereby accepts such employment.

2. The Operating Manager shall have the authority to [fol. 720-2] employ on behalf of the Company such persons as the Operating Manager may deem necessary for the proper operation of the properties and business of the Company and to fix the compensation of such employees and to discharge such employees, and shall have general charge and direction of the operation and management of the properties and business of the Company, subject, however, to the general supervision and control of the Board of Directors of the Company. Nothing in this contract shall be deemed or considered as a surrender or abandonment by the Board

of Directors of the Company of any powers or duties imposed upon them by law, nor, except to the extent that the same may be lawfully delegated to a general manager, as a delegation of any such powers or duties to the Operating Manager.

3. The Operating Manager is hereby authorized to contract for the purchase on behalf of and in the name of the Company such labor, materials, apparatus and supplies as, in the judgment of the Operating Manager, shall be necessary for the operation of the properties and business of the Company and shall also have the same authority in respect of labor and materials for the construction of capital improvements. Except in emergencies, all single items of construction work in excess of Five Thousand Dollars ($5000) chargeable to capital account must first receive the approval of the Board of Directors of the Company before materials or labor shall be purchased or contracted for.

4. Subject to the jurisdiction of the Board of Directors, the Operating Manager may supervise and have charge of the drilling operations of the Company, its entering into [fol. 720-3] or purchase of additional gas leases or purchase contracts, its purchase of rights-of-way and its laying of pipe lines, its serving of customers and the procuring of additional customers.

5. Subject to the jurisdiction of the Board of Directors of the Company, the Operating Manager may formulate, approve, supervise and direct the methods of bookkeeping and the records of the Company, statistical or otherwise, and shall assist in preparing all such reports as are required by law, and will, from time to time and at any time upon request, make reports to the Board of Directors of the affairs of the Company and of the results of the operation of its properties. Nothing herein contained shall be deemed to limit the powers of the Board of Directors to appoint certified public accountants to examine directly and report concerning the business and accounts of the Company.

6. At all times during the existence of this agreement, the Operating Manager shall be considered an employee of the Company and every employee of the Company, whether or not he shall be employed by or upon the recommendation or approval of the Operating Manager, shall be considered

an employee of said Company and the Operating Manager shall not be liable to the Company or to any person or corporation whatsoever for any act or omission of any such employees, negligent or otherwise.

7. As compensation for its services hereunder, the Company agrees to pay and the Operating Manager shall receive each month:

3% on first	$83,333.33 gross operating revenue for the month
2½% on next	83,333.33 gross operating revenue for the month
2% on next	83,333.33 gross operating revenue for the month
1½% on next	83,333.33 gross operating revenue for the month
1% on excess over	333,333.32 gross operating revenue for the month

[fol. 720-4] 8. It is further agreed that in addition to the compensation provided in the foregoing paragraph, the Company will fully reimburse the Operating Manager for all out-of-pocket expenses for traveling, telegrams or telephone, or other expenses which are incurred by the Operating Manager in the management and operation of the properties of the Company and will reimburse the Operating Manager for salaries of its employees who may, from time to time be engaged in routine or special work of the Company in the general field wherein its properties are located.

9. The term of this contract shall extend from the date hereof to August 15, 1934 and thereafter shall remain in force and be binding upon the parties hereto from year to year unless either party is notified in writing, at least three months prior to the expiration of the original term hereof or three months prior to the expiration of any succeeding yearly term hereof, of the desire of the other party to terminate this agreement at the end of the original term or the yearly term (as the case may be) then in force.

10. No recourse shall be had under this agreement against any stockholder, officer or director of either of the contracting parties, either directly or by virtue of any statute or by the enforcement of any assessment, or otherwise, and all personal liability of the stockholders, officers and directors of the contracting parties is expressly waived and released.

[fol. 720-5] In Witness Whereof, the parties hereto have caused this agreement to be executed in their respective corporate names and their respective corporate seals to be

hereto affixed and attested as of the day and year first above written.

Memphis Natural Gas Company (S.) By Milton S. Binswanger, President.

Attested: (S.) H. P. Scott, Asst. Secretary.

Commonwealth Management & Engineering Corporation, (S.) By N. Ray Noffsinger, President.

Attested: (S.) R. J. Skillman, Asst. Secretary.

[fol. 721] EXHIBIT E TO TESTIMONY OF HENRY C. WALLACE

Certificate of Incorporation of Commonwealth Gas Corporation

[fol. 721-1] We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of an act of the Legislature of the State of Delaware entitled "An Act providing a General Corporation Law", approved March 10, 1899, being Chapter 65 of the Revised Code of 1915, and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First: The name of the corporation is

Commonwealth Gas Corporation.

Second: The principal office of the corporation in the State of Delaware is to be located in the City of Dover, in the County of Kent. The name of its resident agent is the United States Corporation Company whose address is No. 19-21 Dover Green in said City.

Third: The nature of the business or objects or purposes proposed to be transacted, promoted or carried on are:

To such extent as a corporation organized under the General Corporation Laws of the State of Delaware may then lawfully do, but not otherwise, to purchase or otherwise acquire, become interested in, hold, sell, mortgage, pledge, or otherwise dispose of, or turn to account or realize upon, all forms of securities, including stocks, bonds, debentures, notes, evidences of indebtedness, certificates of indebtedness, certificates of interest, commercial paper, mortgages,

and other similar instruments and rights, issued or created by corporations, whether public, municipal, quasi-public or private, domestic or foreign, and by associations, firms, trustees, syndicates, individuals, governments, states, municipalities, or other political divisions, and issued or created by others, and to deal in and with the same, and to issue in exchange therefor or in payment therefor its own stock, bonds, debentures, notes, options, rights, or other [fol. 721-2] obligations or securities, or otherwise to pay therefor; to exercise in respect thereof any and all rights, powers and privileges of individual ownership or interest therein, including the right to vote thereon and to consent or otherwise act with respect thereto; to do any and all acts and things for the preservation, protection, improvement and enhancement in value thereof or designed to accomplish any such purpose, and to aid by loan, subsidy, guaranty, underwriting or in any manner those issuing, creating or responsible for any of such securities, all to such extent as a corporation organized under said General Corporation Laws may then lawfully do; to acquire or become interested in any such securities as aforesaid by original subscription, underwriting, participation in syndicates or otherwise, and irrespective of whether or not such securities be fully paid or subject to further payments; and to make payments thereon as called for, or in advance of calls or otherwise, and to underwrite or subscribe for the same conditionally or otherwise, either with a view to investment or for resale, or for any other lawful purpose.

To manufacture, acquire, use, sell, distribute or otherwise dispose of artificial gas for light, heat, power, and other purposes, and to produce, acquire, use, sell and distribute the by-products and residual products therefrom, and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and all necessary equipment and appurtenances therefor; to mine for, produce, buy, acquire, use, sell, distribute or otherwise dispose of natural gas for light, heat, power, and other purposes, and also to produce, acquire, use, sell, and distribute the by-products and residual products therefrom and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and any and all necessary equipment and appurtenances necessary or incidental to such operations and business; to produce, generate, acquire, buy,

use, sell, furnish, distribute or otherwise dispose of a mixture of artificial and natural gas for light, heat, power, and other purposes, and also to produce, acquire, use, sell, and distribute the by-products and residual products therefrom, and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and any and all equipment and appurtenances relating or incidental thereto.

To construct, lay, purchase, or in any manner acquire and to maintain and operate, and to sell, encumber, or in any manner dispose of, pipelines, gas mains, plants, systems, and works for the use, sale, distribution and transportation [fol. 721-3] of natural, artificial and mixed gas for light, heat, power, and other purposes in, on, over, through or under any streets, alleys, roads, highways, or other public ways, places, or in, on, over, through or under any private or public property, and to take, acquire, purchase, hold, own, rent, lease, sell, exchange, mortgage, improve, cultivate, develop and otherwise deal in and dispose of any and all property, real and personal, of every description incidental to or capable of being used in connection with the aforesaid purposes or any of them.

To engage in the business of acquiring, by purchase, lease or otherwise, constructing, holding, owning, managing, operating, and leasing, selling, or otherwise disposing of gas and oil lands, leases and rights, gas pipelines and plants, any or all businesses, factories, plants, workshops, stores, and warehouses allied thereto or connected therewith, and the real property, plants, equipment, appurtenances, machinery, vehicles, inventories, receivables, or any part thereof, and any and all other assets of any person, firm, association or corporation, and to promote, manage, control, supervise, direct or aid in any manner any such operations, business, production, output, and sales; and to make, execute, take or receive any contracts, or assignments of contracts therefor or relating thereto, or connected therewith.

To carry on the business, or any part thereof, of a water works company, a gas, oil, coal, mining or ice company, a steam or electric lighting, heating or power company, a sewer company or a telephone and telegraph company, in all its branches; to sink wells and shafts, and to make, build and construct, lay down and maintain, reservoirs, cisterns, culverts, filter-beds, mains and other pipes and appliances,

and in general to execute and do all other works and things necessary or convenient for obtaining, storing, selling, delivering, measuring and distributing water; to contract for the lease and purchase of the right to prospect for, to mine for, develop and otherwise acquire, use, sell and generally deal in and with gas, oil, coal and other minerals, and to construct, build or otherwise acquire, use and dispose of tanks, cars, pipes and all other facilities and appurtenances incidental to the business of a gas, oil, coal or mining company; to purchase, construct or otherwise acquire, own, maintain, operate and dispose of all kinds of refrigerating and ice making plants and properties, and to sell, distribute and generally deal in and with the products thereof; to build, construct, lay down and maintain mains, pipes, conduits, cesspools, cisterns, culverts, disposal plants, filters [fol. 721-4] and other appliances; to build plants, works, generating stations, power stations and transmitting stations; to run power lines and cables, to erect tanks, posts, poles and towers; to install and own, rent and sell, meters, registers, telephones, and other appliances for use in connection with such business; to manufacture, install, repair, buy, sell, import, export, rent, lease, trade and deal in machinery and appliances of every description for the generation, distribution, transmission and utilization of electric current, direct and alternating, and for the transmission, receiving and distribution of messages or other communications by telephone, telegraph or wireless, including machinery, motors, aerials, generators, dynamos, transformers, storage and other batteries, and machinery, devices, apparatus, appliances, equipment and accessories of every kind and description; to acquire licenses, concessions and permits for all of the foregoing, and in general to execute and carry out all other works and things necessary or convenient for carrying on the business, or any part thereof, or a water works, gas, oil, coal, mining, ice, steam, electric lighting, heating, power, sewer, telephone and telegraph company; provided, however, that such business shall be in all respects authorized by the laws of the jurisdiction where the same is sought to be carried on.

To manufacture, buy, sell, import and export, and otherwise deal in and with, either, as principal or agent or otherwise, goods, wares, merchandise and personal property of every kind and description.

To make and enter into contracts of all kinds with and

to act as agent (other than fiscal) or representative for, any individual, firm, association, private, public, quasi-public or municipal corporation, state, government or governmental authority, and to aid any lawful enterprise.

To erect, build, construct, purchase, rent, equip or otherwise acquire, and to own, hold, improve, develop, manage, maintain, control, operate, lease, mortgage, create liens upon, sell, convey or otherwise dispose of and turn to account—

(1) Any and all plants, machinery, works, implements and things, or property, real and personal of every kind and description, incidental to, connected with, or suitable, necessary or convenient for any of the purposes enumerated in this certificate of incorporation;

(2) Any and all locomotives, railroad cars, tank cars, motor cars, motor trucks, vehicles, buses and bus lines, of [fol. 721-5] any and every description, necessary or convenient in connection with any business enumerated in this certificate of incorporation;

(3) Any and all ships, tugs, boats, barges, floats and vessels, whether operated by steam, electricity, oil, gasoline or any other power, docks, wharves, drydocks, repair wharves, elevators, piers, terminals, warehouses and storage plants, facilities, connections and installations necessary or convenient for any of the businesses enumerated in this certificate of incorporation;

(4) Any and all public and private works and conveniences of every kind, including roads, tramways, bridges, canals, tunnels, gas works and distributing plants, pipe lines, reservoirs, dams, embankments, irrigation systems, storage plants, steam, reclamation, sewerage, drainage, sanitary and water works, electric light, telegraph, telephone and heat, light and power plants and systems, wireless stations and systems, also warehouses, markets, office buildings and private and public buildings, plants for building or assembling, repair shops, facilities and objects of all kinds, and all appliances and appurtenances thereof, and all other works, conveniences and institutions for public and private utility or use;

provided, however, that any of the foregoing shall be in all respects authorized by the laws of the jurisdiction where such public or private works are sought to be instituted or conducted.

To apply for, obtain, register, purchase, procure licenses or otherwise to acquire and to hold, own, use, develop, operate and introduce, and to sell, assign, grant licenses or territorial rights in respect of, mortgage, pledge, or otherwise to turn to account or dispose of, any copyrights, trademarks, trade names, brands, labels, inventions, devices, formulae, processes and all improvements or modifications thereof, whether used in connection with or secured under letters patents or otherwise, and any and all patent rights or letters patent issued by or in the United States of America, or any other country or government.

To merge or consolidate with any corporation in any manner permitted by law or to acquire the good will, rights, property, business and franchises of any person, firm, association or corporation whatsoever now or hereafter engaged in any business which the corporation may lawfully con- [fol. 721-6] duct; to pay therefor in cash or in stock or bonds, debentures, notes, options, rights or other securities of this corporation or otherwise, in the manner provided by law; to hold, utilize, enjoy and in any manner dispose of the whole or any part of the rights and property so acquired; to assume, in connection therewith, any liabilities of any such person, firm, association or corporation, and to conduct in any lawful manner the whole or any part of the business thus acquired.

To purchase, hold, sell and transfer the shares of its own capital stock provided it shall not use its own funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital, and provided further that shares of its own capital stock belonging to it shall not be voted upon, directly or indirectly.

To improve, manage, develop, sell, assign, transfer, lease, mortgage, pledge, or otherwise dispose of or turn to account or deal with all or any part of the property of the corporation, and from time to time to vary any investment or employment of capital of the corporation.

To borrow money, and to make, accept, endorse, discount, execute and issue notes, bonds, debentures, bills of exchange, warrants, obligations, evidences of indebtedness and negotiable instruments of all kinds, whether secured by mortgage, pledge or otherwise, without limit as to amount, and to secure the same by mortgage, pledge or otherwise; to guarantee the payment of dividends upon any stock of any other corporation, or the principal of or interest on, or both, of any bonds, debentures, notes or other obligations

thereof and the performance of contracts, and generally to make and perform agreements and contracts of every kind and description.

To the same extent as natural persons might or could do, to purchase or otherwise acquire, and to hold, own, maintain, work, develop, sell, lease, exchange, hire, convey, mortgage or otherwise dispose of and deal in, lands and leaseholds, and any interest, estate and rights in real property, and any personal or mixed property, and any franchises, rights, licenses or privileges, necessary, convenient or appropriate for any of the purposes herein expressed, in any of the states, districts, territories or colonies of the United States and in any and all foreign countries, subject to the laws of such state, district, territory, colony or country.

To do all and every thing necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of [fol. 721-7] the powers hereinbefore set forth, either alone or in association with other corporations, firms, or individuals, and to do every other act or acts, thing or things, incidental or appurtenant to or growing out of or connected with the aforesaid purposes, objects or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized.

The business of the corporation is from time to time to do any one or more of the acts and things hereinabove set forth, and it shall have power to conduct its said business in the State of Delaware, other States, the District of Columbia, the territories, dependencies, and colonies of the United States and in foreign countries, to have one or more offices outside of the State of Delaware and to hold, purchase, mortgage and convey real and personal property within and without the State of Delaware.

The foregoing clauses shall be construed both as objects and powers and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the corporation and are in furtherance of and in addition to and not in limitation of the general powers conferred by the laws of the State of Delaware.

It is the intention that, except where otherwise expressed herein, the objects, purposes and powers specified in any of the foregoing clauses shall not in any way be limited or

restricted by reference to, or inference from, the terms of any other clause or clauses of this certificate, and that the objects, purposes and powers specified in each of the clauses of this Article Third shall be regarded as independent objects, purposes and powers.

Fourth: The total number of shares of stock which the corporation shall have authority to issue is two thousand (2,000) shares of the par value of one dollar ($1) per share.

The shares of capital stock may be issued by the directors without further action of the stockholders from time to time for such consideration as may be fixed from time to time by the board of directors, subject to such limitations and restrictions, if any, as may be set forth in the by-laws of the corporation. Any and all shares so issued for which the consideration so fixed has been paid or delivered shall be deemed full paid stock and non-assessable, and the holders of such shares shall not be liable for any further call or assessment thereon, and the holders of such shares shall [fol. 721-8] not be liable for any further payments in respect of such shares.

No holder of stock of this corporation shall be entitled as of right to purchase, subscribe for or receive any part of the unissued stock of this corporation or of any additional stock of any class to be issued by reason of any increase of the authorized capital stock of this corporation, or of bonds, certificates of indebtedness, debentures, notes or other securities convertible into stock of this corporation, but any such unissued stock, or such additional authorized issue of new stock or of securities convertible into stock may be issued and disposed of by the board of directors to such persons, firms, corporations or associations, and upon such terms as the board of directors may, in their discretion, determine, without offering to the stockholders then of record, of any class, any thereof, on the same terms or on any terms.

The amount of capital with which the corporation will commence business shall be not less than one thousand dollars ($1,000).

Fifth: The name and place of residence of each of the incorporators are as follows:

Arthur W. Britton, 150 Broadway, New York City;
Raymond J. Gorman, 150 Broadway, New York City;
David H. Jackman, 150 Broadway, New York City.

Sixth: The corporation is to have perpetual existence.

Seventh: The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth: The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the by-laws of the corporation. In case of any increase in the number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the by-laws.

An executive committee may be appointed by or from the board of directors in such manner and subject to such regu- [fol. 721-9] lations as may be provided in the by-laws of the corporation, which committee may have and exercise during the intervals between meetings of the board all the powers of the board which may lawfully be delegated, including the power to authorize the seal of the corporation to be affixed to papers which may require it, subject to such limitations as may be provided in the by-laws of the corporation or by resolution of the board.

Any one or more or all of the directors may be removed either with or without cause, at any time, by vote of the stockholders holding a majority in interest of the outstanding stock of the corporation having voting power, and thereupon the term of office of such director or directors who shall have been so removed shall forthwith terminate and there shall be a vacancy or vacancies in the board of directors, to be filled as provided in the by-laws of the corporation.

The directors from time to time may determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation (other than the stock ledger) or any of them, shall be open to the inspection of the stockholders; and no stockholders shall have any right to inspect any account or book or document of the corporation, unless expressly so authorized by statute or by a resolution of the stockholders or the directors.

The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any meeting of the stockholders called for the purpose of considering any such act or con-

tract, and any contract or act that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the corporation which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of an interest of one or more directors therein, or for any other reason.

No contract or other transaction between the corporation and any other firm or corporation shall be affected or invalidated by the fact that any one or more of the directors of the corporation is or are interested in or is a member, director or officer of such firm or corporation, and any director or officer may be a party individually or jointly in or to such contract or transaction.

[fol. 721-10] The directors shall also have power, without the consent or vote of the stockholders, to make and alter by-laws of the corporation; to fix the times for the declaration and payment of dividends; to fix and vary the amount to be maintained as surplus and the amount to be reserved as working capital; to set apart out of any of the funds of the corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created; to determine the use and disposition of any surplus or net profits of the corporation, and in their discretion the directors may use and apply any such surplus or accumulated profits in purchasing or acquiring the bonds or other obligations or shares of stock of the corporation, to such extent and in such manner and upon such terms as the directors shall deem expedient, and any shares of stock so purchased or acquired may be resold; to authorize and cause to be executed mortgages, deeds of trust, pledges and liens upon all the property, real and personal, of the corporation, or any part thereof; to sell, assign, lease, convey, exchange or otherwise dispose of a part of the property, assets and effects of the corporation less than the whole or less than substantially the whole thereof for such consideration and upon such terms and conditions as the board of directors shall deem expedient and for the best interests of the corporation.

The directors also shall have power, with the consent in writing or upon the affirmative vote of the holders of a majority of the stock issued and outstanding entitled to vote, to sell, lease or exchange all of the property and assets of the corporation, including its good will and its corporate franchise, for such consideration and upon such terms and conditions as the board of directors deem expedient and for the best interests of the corporation.

The incorporators shall have power to hold meetings either within or without the State of Delaware.

Both stockholders and directors shall have power, if the by-laws of the corporation so provide, to hold their meetings either within or without the State of Delaware, to have one or more offices in addition to the principal office in the State of Delaware, and to keep the books of the corporation (subject to the provisions of the statutes) outside of the State of Delaware at such places as may be from time to time designated by them.

In addition to the powers and authorities herei before or by statute expressly conferred upon them, the directors [fol. 721-11] are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the statutes of the State of Delaware, of this certificate, and of the by-laws of the corporation.

Ninth: The holders of all or any part of the shares of the capital stock of the corporation shall have the right from time to time at their discretion to create and form a voting trust or voting trusts. Any such voting trust so formed, if otherwise legal, shall not be held to be void or against public policy because of any separation of the ownership or voting power of such stock from the beneficial interest therein. The mutual agreements of the parties to any such voting trust shall alone be deemed a sufficient consideration to uphold and validate such voting trust. Any such voting trust shall be deemed to be an active and not a passive or dry trust.

Tenth: The corporation reserves the right to amend, alter, change, add to or repeal any provision contained in this certificate of incorporation in the manner now or hereafter prescribed by statute, and all rights conferred on officers, directors and stockholders herein are granted subject to this reservation.

In Witness Whereof, we have hereunto set our hands and seals the 14th day of July, 1933.

Arthur W. Britton (L. S.). Raymond J. Gorman (L. S.) David H. Jackman (L. S.)

In presence of: S. C. Wood, as to all.

[fol. 721-12] State of New York,
County of New York, ss:

Be It Remembered that on this 14th day of July, 1933, personally came before me, a Notary Public in and for the State and County of New York, Arthur W. Britton, Raymond J. Gorman and David H. Jackman, being all of the parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Samuel C. Wood, Notary Public, Kings County Clerk's No. 339, New York County Clerk's No. 171. Term Expires March 30, 1935.

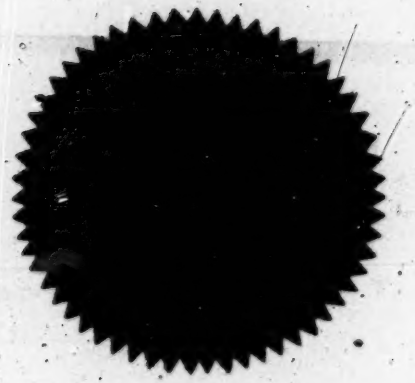
(Here follows 1 photolithograph, side folio 721-13)

State of Delaware

Office of Secretary of State.

I, Charles H. Grantland, *Secretary of State of the State of Delaware,* do hereby certify *that the above and foregoing is a true and correct copy of* Certificate of Incorporation of the "COMMONWEALTH GAS CORPORATION", as received and filed in this office the fifteenth day of July, A. D. 1933, at 9 o'clock A. M.

In Testimony Wherrof, I have hereunto set my hand and official seal at Dover this fifteenth day of July in the year of our Lord one thousand nine hundred and thirty-three.



Edmund M. Cruikshank

721-13 Secretary of State

496A

[fol. 721a] Amended Certificate of Incorporation of Commonwealth Gas Corporation

Before Payment of Capital

[fol. 721b] First. The name of the corporation is Commonwealth Gas Corporation.

Second. The principal office of the corporation in the State of Delaware is to be located in the City of Dover, in the County of Kent. The name of its resident agent is the United States Corporation Company whose address is No. 19-21 Dover Green in said City.

Third. The nature of the business or objects or purposes proposed to be transacted, promoted or carried on are;

To such extent as a corporation organized under the General Corporation Laws of the State of Delaware may then lawfully do, but not otherwise, to purchase or otherwise acquire, become interested in, hold, sell, mortgage, pledge, or otherwise dispose of, or turn to account or realize upon, all forms of securities, including stocks, bonds, debentures, notes, evidences of indebtedness, certificates of indebtedness, certificates of interest, commercial paper, mortgages, and other similar instruments and rights, issued or created by corporations, whether public, municipal, quasi-public or private, domestic or foreign, and by associations, firms, trustees, syndicates, individuals, governments, states, municipalities, or other political divisions, and issued or created by others, and to deal in and with the same, and to issue in exchange therefor or in payment therefor its own stock, bonds, debentures, notes, options, rights or other obligations or securities, or otherwise to pay therefor; to exercise in respect thereof any and all rights, powers and privileges of individual ownership or interest therein, including the right to vote thereon and to consent or otherwise act with respect thereto; to do any and all acts and things for [fol. 721c] the preservation, protection, improvement and enhancement in value thereof or designed to accomplish any such purpose, and to aid by loan, subsidy, guaranty, underwriting or in any manner those issuing, creating or responsible for any of such securities, all to such extent as a corporation organized under said General Corporation Laws may then lawfully do; to acquire or become interested

in any such securities as aforesaid by original subscription, underwriting, participation in syndicates or otherwise, and irrespective of whether or not such securities be fully paid or subject to further payments; and to make payments thereon as called for, or in advance of calls or otherwise, and to underwrite or subscribe for the same conditionally or otherwise, either with a view to investment or for resale, or for any other lawful purpose.

To manufacture, acquire, use, sell, distribute or otherwise dispose of artificial gas for light, heat, power, and other purposes, and to produce, acquire, use, sell and distribute the by-products and residual products therefrom, and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and all necessary equipment and appurtenances therefor; to mine for, produce, buy, acquire, use, sell, distribute or otherwise dispose of natural gas for light, heat, power, and other purposes, and also to produce, acquire, use, sell, and distribute the by-products and residual products therefrom and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and any and all necessary equipment and appurtenances necessary or incidental to such operations and business; to produce, generate, acquire, buy, use, sell, furnish, distribute or otherwise dispose of a mixture of artificial and natural gas for light, heat, power, and other purposes, and also to produce, acquire, use, sell, and distribute the by-products and residual products therefrom, and to construct or in any manner acquire, maintain, operate, encumber, sell, or in any manner dispose of works therefor, and any and all equipment and appurtenances relating or incidental thereto.

To construct, lay, purchase, or in any manner acquire and to maintain and operate, and to sell, encumber, or in any manner dispose of, pipelines, gas mains, plants, systems, and works for the use, sale, distribution and transportation of natural, artificial and mixed gas for light, heat, power, and other purposes in, on, over, through or under any streets, alleys, roads, highways, or other public ways, places, or in, on, over, through or under any private [fol. 721d] or public property, and to take, acquire, purchase, hold, own, rent, lease, sell, exchange, mortgage, improve, cultivate, develop and otherwise deal in and dispose of any and all property, real and personal, of every descrip-

tion incidental to or capable of being used in connection with the aforesaid purposes or any of them.

To engage in the business of acquiring, by purchase, lease or otherwise, constructing, holding, owning, managing, operating, and leasing, selling, or otherwise disposing of gas and oil lands, leases and rights, gas pipelines and plants, any or all businesses, factories, plants, workshops, stores, and warehouses allied thereto or connected therewith, and the real property, plants, equipment, appurtenances, machinery, vehicles, inventories, receivables, or any part thereof, and any and all other assets of any person, firm, association or corporation, and to promote, manage, control, supervise, direct or aid in any manner any such operations, business, production, output, and sales; and to make, execute, take or receive any contracts, or assignments of contracts therefor or relating thereto, or connected therewith.

To carry on the business, or any part thereof, of a water works company, a gas, oil, coal, mining or ice company, a steam or electric lighting, heating or power company, a sewer company or a telephone and telegraph company, in all its branches; to sink wells and shafts, and to make, build and construct, lay down and maintain, reservoirs, cisterns, culverts, filter-beds, mains and other pipes and appliances, and in general to execute and do all other works and things necessary or convenient for obtaining, storing, selling, delivering, measuring and distributing water; to contract for the lease and purchase of the right to prospect for, to mine for, develop and otherwise acquire, use, sell and generally deal in and with gas, oil, coal and other minerals, and to construct, build or otherwise acquire, use and dispose of tanks, cars, pipes and all other facilities and appurtenances incidental to the business of a gas, oil, coal or mining company; to purchase, construct or otherwise acquire, own, maintain, operate and dispose of all kinds of refrigerating and ice making plants and properties, and to sell, distribute and generally deal in and with the products thereof; to build, construct, lay down and maintain mains, pipes, conduits, cesspools, cisterns, culverts, disposal plants, filters and other appliances; to build plants, works, generating stations, power stations and transmitting stations; to run [fol. 721-e] power lines and cables; to erect tanks, posts, poles and towers; to install and own, rent and sell, meters, registers, telephones, and other appliances for use in

connection with such business; to manufacture, install, repair, buy, sell, import, export, rent, lease, trade and deal in machinery and appliances of every description for the generation, distribution, transmission and utilization of electric current, direct and alternating, and for the transmission, receiving and distribution of messages or other communications by telephone, telegraph or wireless, including machinery, motors, aerials, generators, dynamos, transformers, storage and other batteries, and machinery, devices, apparatus, appliances, equipment and accessories of every kind and description; to acquire licenses, concessions and permits for all of the foregoing, and in general to execute and carry out all other works and things necessary or convenient for carrying on the business, or any part thereof, of a water works, gas, oil, coal, mining, ice, steam, electric lighting, heating, power, sewer, telephone and telegraph company; provided, however, that such business shall be in all respects authorized by the laws of the jurisdiction where the same is sought to be carried on.

To manufacture, buy, sell, import and export, and otherwise deal in and with, either, as principal or agent or otherwise, goods, wares, merchandise and personal property of every kind and description.

To make and enter into contracts of all kinds with and to act as agent (other than fiscal) or representative for, any individual, firm, association, private, public, quasi-public or municipal corporation, state, government or governmental authority, and to aid any lawful enterprise.

To erect, build, construct, purchase, rent, equip or otherwise acquire, and to own, hold, improve, develop, manage, maintain, control, operate, lease, mortgage, create liens upon, sell, convey or otherwise dispose of and turn to account—

(1) Any and all plants, machinery, works, implements and things, or property, real and personal of every kind and description, incidental to, connected with, or suitable, necessary or convenient for any of the purposes enumerated in this certificate of incorporation;

(2) Any and all locomotives, railroad cars, tank cars, motor cars, motor trucks, vehicles, buses and bus lines, of any and every description, necessary or convenient in connection with any business enumerated in this certificate of incorporation;

[fol. 721f] (3) Any and all ships, tugs, boats, barges, floats and vessels, whether operated by steam, electricity, oil, gasoline or any other power, docks, wharves, drydocks, repair wharves, elevators, piers, terminals, warehouses and storage plants, facilities, connections and installations necessary or convenient for any of the businesses enumerated in this certificate of incorporation;

(4) Any and all public and private works and conveniences of every kind, including roads, tramways, bridges, canals, tunnels, gas works and distributing plants, pipe lines, reservoirs, dams, embankments, irrigation systems, storage plants, steam, reclamation, sewerage, drainage, sanitary and water works, electric light, telegraph, telephone and heat, light and power plants and systems, wireless stations and systems, also warehouses, markets, office buildings and private and public buildings, plants for building or assembling, repair shops, facilities and objects of all kinds, and all appliances and appurtenances thereof, and all other works, conveniences and institutions for public and private utility or use;

provided, however, that any of the foregoing shall be in all respects authorized by the laws of the jurisdiction where such public or private works are sought to be instituted or conducted.

To apply for, obtain, register, purchase, procure licenses or otherwise to acquire and to hold, own, use, develop, operate and introduce, and to sell, assign, grant licenses or territorial rights in respect of, mortgage, pledge, or otherwise to turn to account or dispose of, any copyrights, trademarks, trade names, brands, labels, inventions, devices, formulae, processes and all improvements or modifications thereof, whether used in connection with or secured under letters patents or otherwise, and any and all patent rights or letters patent issued by or in the United States of America, or any other country or government.

To merge or consolidate with any corporation in any manner permitted by law or to acquire the good will, rights, property, business and franchises of any person, firm, association or corporation whatsoever now or hereafter engaged in any business which the corporation may lawfully conduct; to pay therefor in cash or in stock or bonds, debentures, notes, options, rights or other securities of this cor-

[fol. 721g] poration or otherwise, in the manner provided

by-law; to hold, utilize, enjoy and in any manner dispose of the whole or any part of the rights and property so acquired; to assume, in connection therewith, any liabilities of any such person, firm, association or corporation, and to conduct in any lawful manner the whole or any part of the business thus acquired.

To purchase, hold, sell and transfer the shares of its own capital stock provided it shall not use its own funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of its capital, and provided further that shares of its own capital stock belonging to it shall not be voted upon, directly or indirectly.

To improve, manage, develop, sell, assign, transfer, lease, mortgage, pledge, or otherwise dispose of or turn to account or deal with all or any part of the property of the corporation, and from time to time to vary any investment or employment of capital of the corporation.

To borrow money, and to make, accept, endorse, discount, execute and issue notes, bonds, debentures, bills of exchange, warrants, obligations, evidences of indebtedness and negotiable instruments of all kinds, whether secured by mortgage, pledge or otherwise, without limit as to amount, and to secure the same by mortgage, pledge or otherwise; to guarantee the payment of dividends upon any stock of any other corporation, or the principal of or interest on, or both, of any bonds, debentures, notes or other obligations thereof and the performance of contracts, and generally to make and perform agreements and contracts of every kind and description.

To the same extent as natural persons might or could do, to purchase or otherwise acquire, and to hold, own, maintain, work, develop, sell, lease, exchange, hire, convey, mortgage or otherwise dispose of and deal in, lands and leaseholds, and any interest, estate and rights in real property, and any personal or mixed property, and any franchises, rights, licenses or privileges necessary, convenient or appropriate for any of the purposes herein expressed, in any of the states, districts, territories or colonies of the United States and in any and all foreign countries, subject to the laws of such state, district, territory, colony or country.

To do all and every thing necessary, suitable and proper for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers hereinbefore set forth, either alone or in associa-

tion with other corporations, firms, or individuals, and to [fol. 721h] do every other act or acts, thing or things, incidental or appurtenant to or growing out of or connected with the aforesaid purposes, objects or powers or any part or parts thereof, provided the same be not inconsistent with the laws under which this corporation is organized.

The business of the corporation is from time to time to do any one or more of the acts and things hereinabove set forth, and it shall have power to conduct its said business in the State of Delaware, other States, the District of Columbia, the territories, dependencies, and colonies of the United States and in foreign countries, to have one or more offices outside of the State of Delaware and to hold, purchase, mortgage and convey real and personal property within and without the State of Delaware.

The foregoing clauses shall be construed both as objects and powers and it is hereby expressly provided that the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the corporation and are in furtherance of and in addition to and not in limitation of the general powers conferred by the laws of the State of Delaware.

It is the intention that, except where otherwise expressed herein, the objects, purposes and powers specified in any of the foregoing clauses shall not in any way be limited or restricted by reference to, or inference from, the terms of any other clause or clauses of this certificate, and that the objects, purposes and powers specified in each of the clauses of this Article Third shall be regarded as independent objects, purposes and powers.

Fourth. The total number of shares of stock which the corporation shall have authority to issue is one million three hundred thousand (1,300,000) shares of the par value of one dollar ($1) per share.

The shares of capital stock may be issued by the directors without further action of the stockholders from time to time for such consideration as may be fixed from time to time by the board of directors, subject to such limitations and restrictions, if any, as may be set forth in the by-laws of the corporation. Any and all shares so issued for which the consideration so fixed has been paid or delivered shall be deemed full paid stock and non-assessable; and the holders of such shares shall not be liable for any further call

or assessment thereon, and the holders of such shares shall [fol. 721i] not be liable for any further payments in respect of such shares.

No holder of stock of this corporation shall be entitled as of right to purchase, subscribe for or receive any part of the unissued stock of this corporation or of any additional stock of any class to be issued by reason of any increase of the authorized capital stock of this corporation, or of bonds, certificates of indebtedness, debentures, notes or other securities convertible into stock of this corporation, but any such unissued stock, or such additional authorized issue of new stock or of securities convertible into stock may be issued and disposed of by the board of directors to such persons, firms, corporations or associations, and upon such terms as the board of directors may, in their discretion, determine, without offering to the stockholders then of record, of any class, any thereof, on the same terms or on any terms.

The amount of capital with which the corporation will commence business shall be not less than one thousand dollars ($1,000).

Fifth. The name and place of residence of each of the incorporators are as follows:

Arthur W. Britton, 150 Broadway, New York City.
Raymond J. Gorman, 150 Broadway, New York City.
David H. Jackman, 150 Broadway, New York City.

Sixth. The corporation is to have perpetual existence.

Seventh. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Eighth. The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the by-laws of the corporation. In case of any increase in the number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the by-laws.

An executive committee may be appointed by or from the board of directors in such manner and subject to such regulations as may be provided in the by-laws of the corpo-

[fol. 721j] ration, which committee may have and exercise during the intervals between meetings of the board all the powers of the board which may lawfully be delegated, including the power to authorize the seal of the corporation to be affixed to papers which may require it, subject to such limitations as may be provided in the by-laws of the corporation or by resolution of the board.

Any one or more or all of the directors may be removed either with or without cause, at any time, by vote of the stockholders holding a majority in interest of the outstanding stock of the corporation having voting power, and thereupon the term of office of such director or directors who shall have been so removed shall forthwith terminate and there shall be a vacancy or vacancies in the board of directors, to be filled as provided in the by-laws of the corporation.

The directors from time to time may determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation (other than the stock ledger) or any of them, shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the corporation, unless expressly so authorized by statute or by a resolution of the stockholders or the directors.

The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the corporation which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of an interest of one or more directors therein, or for any other reason.

No contract or other transaction between the corporation and any other firm or corporation shall be affected or invalidated by the fact that any one or more of the directors of the corporation is or are interested in or is a member, director or officer of such firm or corporation, and any di-

rector or officer may be a party individually or jointly in or to such contract or transaction.

[fol. 721-k] The directors shall also have power, without the consent or vote of the stockholders, to make and alter by-laws of the corporation; to fix the times for the declaration and payment of dividends; to fix and vary the amount to be maintained as surplus and the amount to be reserved as working capital; to set apart out of any of the funds of the corporation available for dividends a reserve or reserves for any proper purpose and to abolish any such reserve in the manner in which it was created; to determine the use and disposition of any surplus or net profits of the corporation, and in their discretion the directors may use and apply any such surplus or accumulated profits in purchasing or acquiring the bonds or other obligations or shares of stock of the corporation, to such extent and in such manner and upon such terms as the directors shall deem expedient, and any shares of stock so purchased or acquired may be resold; to authorize and cause to be executed mortgages, deeds of trust, pledges and liens upon all the property, real and personal, of the corporation, or any part thereof; to sell, assign, lease, convey, exchange or otherwise dispose of a part of the property, assets and effects of the corporation less than the whole or less than substantially the whole thereof, for such consideration and upon such terms and conditions as the board of directors shall deem expedient and for the best interests of the corporation.

The directors also shall have power, with the consent in writing or upon the affirmative vote of the holders of a majority of the stock issued and outstanding entitled to vote, to sell, lease or exchange all of the property and assets of the corporation, including its good will and its corporate franchise, for such consideration and upon such terms and conditions as the board of directors deem expedient and for the best interests of the corporation.

The incorporators shall have power to hold meetings either within or without the State of Delaware.

Both stockholders and directors shall have power, if the by-laws of the corporation so provide, to hold their meetings either within or without the State of Delaware, to have one or more offices in addition to the principal office in the State of Delaware, and to keep the books of the corporation (subject to the provisions of the statutes) outside of the State

of Delaware at such places as may be from time to time designated by them.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the directors [fol. 721-l] are hereby empowered to exercise all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the statutes of the State of Delaware, of this certificate, and of the by-laws of the corporation.

Ninth. The holders of all or any part of the shares of the capital stock of the corporation shall have the right from time to time at their discretion to create and form a voting trust or voting trusts. Any such voting trust so formed, if otherwise legal, shall not be held to be void or against public policy because of any separation of the ownership or voting power of such stock from the beneficial interest therein. The mutual agreements of the parties to any such voting trust shall alone be deemed a sufficient consideration to uphold and validate such voting trust. Any such voting trust shall be deemed to be an active and not a passive or dry trust.

Tenth. The corporation reserves the right to amend, alter, change, add to or repeal any provision contained in this certificate of incorporation in the manner now or hereafter prescribed by statute, and all rights conferred on officers, directors and stockholders herein are granted subject to this reservation.

We, the undersigned, being each of the incorporators hereinbefore named, for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of an Act of the General Assembly of the State of Delaware entitled "An Act providing a General Corporation Law", approved March 10, 1899, and the acts amendatory thereof and supplemental thereto, do make and file this certificate, hereby declaring and certifying that the facts herein stated are true; and the undersigned, being all the incorporators of Commonwealth Gas Corporation, a corporation organized under and in pursuance of the Act of the General Assembly of the State of Delaware hereinbefore set forth, and the acts amendatory thereof and supplemental thereto, the certificate of incorporation of which was duly filed in the office of the Secretary

of State of Delaware on July 15, 1933, and recorded in the office of the Recorder of Deeds for Kent County on July 15, 1933, no part of the capital stock of said corporation having been paid, do hereby pursuant to the provisions [fol. 721-m] of section 25 of said General Corporation Law, amend said certificate of incorporation so that the same shall read as hereinbefore set forth.

In Witness Whereof, we have hereunto set our hands and seals the 20th day of July, 1933.

Arthur W. Britton (L. S.), Raymond J. Gorman (L. S.), David H. Jackman (L. S.).

In presence of Edward S. Williams. As to all.

[fol. 721-n] State of New York,
County of New York, ss:

Be it remembered that on this 20th day of July, 1933, personally came before me, a Notary Public in and for the State and County of New York, Arthur W. Britton, Raymond J. Gorman and David H. Jackman, being all of the parties to the foregoing Amended Certificate of Incorporation before payment of capital, known to me personally to be such, and severally acknowledged the said Certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Edward S. Williams, Notary Public. Kings County Clerks No. 346, N. Y. County Clerks No. 207. Term expires March 30, 1935.

Edward S. Williams, Notary Public, Kings County.

(Here follows 1 photolithograph, side folio 721-o)

State of Delaware

Office of Secretary of State.

I, Charles H. Grantland, *Secretary of State of the State of Delaware,* do hereby certify *that the above and foregoing is a true and correct copy of* Amended Certificate of Incorporation of the "COMMONWEALTH GAS CORPORATION", as received and filed in this office the twenty-first day of July, A. D. 1933, at 9 o'clock A.M.

In Testimony Whereof, I have hereunto set my hand and official seal, at Dover, this twenty-first day of July in the year of our Lord one thousand nine hundred and thirty-three.

Charles H. Grandgent

Secretary of State

721 -0

FORM 721 GM-1-20-32

5084

[fol. 722] EXHIBIT A TO TESTIMONY OF BIRGER L. JOHNSON

Agreement Between Memphis Natural Gas Company and Memphis Power & Light Company

[fol. 723] Certificate

I, A. C. Dearth, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copy of an agreement between Memphis Natural Gas Company and Memphis Power & Light Company dated May 24, 1928, with the original executed agreement and that the attached copy is a true and complete copy thereof.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 12th day of November, 1938.

A. C. Dearth, Assistant Secretary. (Seal.)

[fol. 724] This Agreement, made and entered into as of this 24th day of May, 1928, by and between Memphis Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the Seller, party of the first part, and Memphis Power & Light Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the Buyer, party of the second part;

Whereas, the Seller desires to sell and deliver to the Buyer and the Buyer desires to purchase natural gas, as hereinafter provided, and

Whereas, the Seller and the Buyer are about to expend large sums of money, respectively, to prepare to deliver and distribute natural gas:

Now, Therefore, This Agreement Witnesseth: That the parties hereto in consideration of the covenants and payments herein set forth have covenanted and agreed, and do hereby covenant and agree as follows:

First. This agreement shall take effect if and when a franchise ordinance in the form hereto attached marked Exhibit A shall become effective after the due passage by the Board of Commissioners of the City of Memphis, Tennessee, and approval thereof by the Mayor of said City, and

after the due approval by the Railroad and Public Utilities [fol. 725] Commission of the State of Tennessee, and the parties hereto agree to cooperate and use their best efforts to obtain such passage and approval of said ordinance so soon as possible after the date hereof.

Second. The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as may be requisite (1) to fulfill all contracts made by the Buyer for the sale of natural gas in the City of Memphis and in Shelby County, Tennessee, and (2) for use by the Buyer for fuel in its electric generating plant or plants in accordance with the contract of even date herewith between the parties hereto. The buyer agrees that it will advise the Seller's representatives as far in advance of changes in its demands as operating conditions will permit.

Provided, however, that the Seller shall not be obligated to sell and deliver natural gas in excess of the amount it has currently available for delivery, as defined in Articles, Twelfth, Thirteenth and Fourteenth hereof.

Third. The Seller agrees to construct and put in operation a pipe line to supply the natural gas requirements of its customers, including Memphis Power & Light Company, with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours, which will be capable of expansion by the installation of additional compressor stations as marketing conditions [fol. 726] may justify, from a site to be selected by the Seller and Industrial Gas Company at or near Fowler, Louisiana, to a point at or near the corporate limits of the City of Memphis, Tennessee to be selected by the parties hereto, if said pipe line runs through Arkansas, or to a point to be so selected, at or near Nonconnah Creek, if said pipe line runs through Mississippi, the point finally so selected by the parties hereto being sometimes referred to herein as the point of delivery.

The Seller agrees to commence construction of said line and all facilities relating thereto within thirty days from the date when this agreement shall take effect, and to compiete said line ready to delivery gas at the point of delivery on or about the expiration of nine months from the date hereby fixed for the commencement of the construction of said line subject to an extension equalling any de-

lays in the construction of said line caused by acts of God, the elements, labor troubles, accidents, and any and all other causes not reasonably within the control of the Seller.

Fourth. The Buyer agrees coincidentally with commencement of the construction of said pipe line by the Seller to commence the construction and installation of a pipe line to connect its gas distribution system with the pipe line, to be built by the Seller, at the point of delivery and to construct and install, ready for operation, the necessary con-
[fol. 727] nections at the place of delivery to enable the Seller to make connection with the distribution system of the Buyer, and to complete the installation of all such facilities, ready for operation, on or before the completion of the pipe line to be built by the Seller. The Buyer further agrees, coincidentally with the construction of said pipe line by the Seller, to adapt its gas distribution system to the distribution and supply of natural gas, during the continuance of this agreement for the purchase and sale of natural *as* to use its best efforts to develop a market, both domestic and industrial, for natural gas in the territory served by the Buyer.

Fifth. The place of delivery of the natural gas deliverable hereunder is at the said point at or near the corporate limits of the City of Memphis, or said point at or near Nonconnah Creek, as the case may be, finally selected by the parties hereto, and the Seller shall there furnish, install operate, and maintain at its own expense a regulating and measuring station properly equipped with orifice meters and recording gauges, or other type of meters of standard type as may be mutually agreed upon the readings and/or records of which shall fix the total amount of natural gas delivered by the Seller to the Buyer.

The measuring equipment so installed by the Seller, together with any buildings erected by it for such equ.,-ment; shall be and remain its property. The Buyer shall
[fol. 728] have access to said metering equipment at all reasonable times, but the reading calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of the Seller. Charts and records from such metering equipment shall remain the property of the Seller. Upon request of the Buyer, the Seller will submit to the Buyer records and charts from its metering equipment, together with calculations therefrom, for the

Buyer's inspection and verification, subject to return by the Buyer, within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by the Seller for the mutual use of both parties. At least twice each month, and on dates as near the first and sixteenth of the month as practicable, the Seller shall calibrate its meter in the presence of representatives of the Buyer and the parties shall jointly observe any adjustments which are made to the meter should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by the Buyer in the presence of representatives of the Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then [fol. 729] cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and correctness jointly made for the monthly settlements. Each party shall give to the other party notice of the time all tests of meters sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two per cent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight (8) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

[fol. 730] (a) By using the registration of any check meter, or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degree- Fahrenheit and at a base pressure of eight ounces gauge pressure above fourteen and sixty-five hundredths (14.65) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and sixty-five hundre-ths (14.65) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computions [fol. 731] shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such time and places as, in accordance with good practice, may be agreed upon from time to time between the Seller and the Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average hourly temperature recorded each twenty-four (24- hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16th) of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method of test as shall be agreed upon by the parties. The regular test on the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first fifteen (15) days of such calendar month or until changed by special test, the special test to be applicable from the day made and through the following [fol. 732] days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by special test, the special test to be applicable from the day made through the remaining days in such calendar month.

The Buyer may at its option and at its cost and expense install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the point of delivery as specified herein is on the premises of the Seller, the Seller grants to the Buyer the right of free use and ingress and egress to such metering equipment at all times for the purpose of installation, operation, repair and/or removal. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but the Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of the Seller as to type and method [fol. 733] of installation. In the event check metering equipment is installed by the Buyer, the Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of

charts shall be done only by employes or agents of the Buyer. Charts and records from said check metering equipment shall remain the property of the Buyer. Upon request of the Seller, the Buyer shall submit to the Seller records and charts from said check metering equipment, together with calculations therefrom for the Seller's inspection and verification, subject to return by the Seller within ten (10) days from receipt thereof.

The Seller shall render to the Buyer, on or before the fifteenth (15th) day of each month, a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payments or payments then due from the Buyer to the Seller therefor at the rates for natural gas herein set forth in Article Sixth. Unless exceptions thereto in writing shall be made by the Buyer within ten (10) days after it shall receive such statement, the statements of deliveries so furnished by the Seller to the Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments then pending and excepting for adjustments made in accordance with the provisions of Article Eleventh hereof.

Sixth: Subject to adjustment in accordance with the pro-
[fol. 734] visions of Article Eleventh hereof, the Buyer shall pay the Seller monthly for gas purchased hereunder during the preceding calendar month at the following rates:

(a) For gas purchased for use for domestic cooking and water heating, 30 cents for each thousand cubic feet;

(b) For gas purchased for use for domestic house heating, 25 cents for each thousand cubic feet;

(c) For gas purchased for use for commercial purposes, 25 cents for each thousand cubic feet;

(d) For gas purchased for use of commercial heating, 15 cents for each thousand cubic feet;

(e) For gas purchased for use for industrial purposes, 13 cents for each thousand cubic feet; and

(f) For all other gas delivered by the Seller to the Buyer at the point of delivery during the proceding calendar month (except gas delivered to the Buyer in accordance with the contract between the parties hereto of even date herewith for the purchase and sale of natural gas for use

in the electric generating station or stations of the Buyer) 13 cents for each thousand cubic feet (such other gas referred to in this subdivision (f) being herein sometimes called "unaccounted for gas")

Seventh: The separation of the total amount of gas purchased by the Buyer into the respective portions purchased for the respective classes of use referred to in subdivisions [fol. 735] (a) to (f), both inclusive, of article Sixth hereof, shall, for the purposes of payment, be determined as follows:

(a) Of the total amount of gas purchased hereunder, the respective portions purchased for each of the respective purposes referred to in subdivisions (a) to (e), both inclusive, of Article Sixth hereof, shall be considered to be the respective amounts actually sold for each of said respective purposes, as determined from the records of the Buyer's meters in connection with said respective uses, computed at a pressure of eight ounces above 14.65 pounds absolute (barometric) pressure, and on the basis of the temperatures and specific gravities established, as hereinbefore provided, at the place of delivery for corresponding periods of time. For the purpose of this subdivision (a) of this Article Seventh, all gas sold by the Buyer for domestic service at a rate of Seventy-five (75) cents or more per thousand cubic feet shall be deemed to be gas purchased hereunder for use for domestic cooking and water heating, and all gas sold by the Buyer for domestic service at a rate of less than Seventy-five (75¢) cents per thousand cubic feet shall be deemed to be gas purchased hereunder for use for domestic house heating. The Buyer shall render to the Seller on or before the tenth day of each calendar month a statement showing the quantities of gas sold for each of the respective purposes mentioned in subdivisions (a) to (e), both inclusive, [fol. 736] of said Article Sixth during the preceding calendar month.

(b) The amount of unaccounted for gas referred to in subdivision (f) of Article Sixth shall be determined by substracting from the total amount of gas delivered by the Seller to the Buyer at the place of delivery during the month the amounts of gas purchased for the respective purposes mentioned in subdivisions (a) to (e), both inclusive, of said Article Sixth, determined as provided in subdivi-

sion (a) of this Article, and by substracting also the amount of gas purchased by the Buyer under said contract of even date herewith for use in its electric generating station or stations, determined as provided in said contract of even date herewith.

The Seller's meters at the place of delivery shall be read for billing purposes as nearly as practicable at the end of each calendar month, and the meters of the Buyer for the records required under subdivisions (a) and (b), immediately proceeding, shall be read as nearly as practicable at the end of each calendar month.

Eighth. The Buyer agrees to pay the Seller at its office in Memphis, Tenn. on or before the twenty-fifth (25th) of the month, for said natural gas deliveries of the proceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer [fol. 737] fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent (6%) per annum from the date when such amount was due to the date of payment. In the event that at any time because of the failure or inability of the Seller to deliver all or any portion of the natural gas needed by the Buyer to supply its customers, the Buyer is obliged to manufacture and supply to its customers manufactured gas, an equitable adjustment shall be made between the parties hereto for the natural gas, if any, supplied by the Seller to the Buyer during such period and for the manufactured gas supplied by the Buyer into its system during such period.

Ninth. Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein sometimes referred to as a "contract year"), the Seller shall deliver to the Buyer and to the City of Memphis, a statement setting forthe in reasolable detail:

(1) The Seller's investment on the last day of the contract year covered by such statement used or useful for the transportation or supply of natural gas by the Seller to the Buyer. For the purposes of this agreement $7,300,000 is the amount of all expenditures and/or costs of the Seller in a[illegible] pipe lines, compressing stations, measuring equipment

and other equipment, facilities and installations used or [fol. 738] useful for the transportation or supply of natural gas necessary to construct and put in operation the pipe line, provided for under Article Third hereof, with an initial delivery capacity at Memphis, Tennessee, of not less than 60,000,000 cubic feet per day of twenty-four hours and capable of expansion by the installation of additional compressor stations as marketing conditions may justify. For the purpose of this agreement the Seller's investment on the last of any contract year used or useful for the transportation or supply of natural gas by the Seller to the Buyer shall consist of (a) said amount of $7,300,000 and (b) all proper costs for any pipe line, compressing stations, measuring equipment and other equipment, facilities and installations, used or useful for the transportation or supply of natural gas by the Seller to the Buyer and incurred after the date when said pipe line to be built by the Seller pursuant to Article Third shall have been completed and put in operation and up to and including the last day of such contract year; provided, however, that if the Seller shall supply gas to others than the Buyer the sum of the amounts under (a) and (b) of this sentence shall be reduced in accordance with the relative amounts of gas supplied by the Seller to the Buyer and to others and with the relative amounts of investments used or useful for the transportation or supply of natural gas by the Seller to the Buyer [fol. 739] and by the Seller to such other customers.

(2) The gross revenues of the Seller from the sale of natural gas during such contract year delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyer's electric generating station or stations.

(3) All costs of maintaining and operating the pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer for such contract year such costs to include all expenditures made for current operations and ordinary maintenance and all general, administrative and office expenses properly chargeable to the operation and maintenance of such pipe lines, compressing stations, measuring equipment and other equipment, facilities and installations owned by the Seller in connection

with the transportation or supply of natural gas by the Seller to the Buyer and including payments made by the Seller under its purchase contract or purchase contracts for natural gas delivered by the Seller to the Buyer under this contract and the contract of even date herewith for the supply of gas to the Buyer's electric generating station or stations during such contract year and any and all reasonable costs of operation and maintenance of the pipe [fol. 740] line, contemplated by this contract, not otherwise enumerated.

(4) All reasonable charges for such contract year which may be agreed to by the Buyer which previous operation of the Seller's system for the transportation or supply of natural gas indicates to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Seller's investment, as above defined, in pipe lines, compressing stations, measuring equipment, and other equipment, facilities and installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer; provided, however, that there is not to be included in this amount any sum to amortize any portion of the Seller's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereunder. The replacement of any of the pipe lines, compressing stations, measuring equipment, or other equip- [fol. 741] ment, facilities or installations shall not prevent the completion of the amortization of the original.

(6) All taxes payable during such contract year because of the ownership or operation by the Seller of the pipe lines, compressing stations, measuring equipment, or other equipment, facilities or installations owned by the Seller and used or useful for the transportation or supply of natural gas by the Seller to the Buyer.

(7) Six per cent of the Seller's investment, as above defined, on the last day of such contract year (without deduction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary maintenance, renewals, replacements, or amortization.

(8) The net surplus or net deficit of the Seller for such contract year, as determined by substracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6) and (7) above.

Tenth. Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein sometimes referred to as a "contract year"), the Buyer shall deliver to the Seller and to the City of Memphis a statement [fol. 742] setting forth in reasonable details:

(1) The Buyer's investment on the last day of the contract year covered by such statement used or useful for the distribution or supply of gas. For the purpose of this agreement $6,300,000 is the amount of the Buyer's investment at the date hereof used or useful for the distribution or supply of gas. For the purpose of this agreement the Buyer's investment on the last day of any contract year used or useful for the distribution or supply of gas shall consist of (a) said amount of $6,300,000 and (b) all proper costs for any pipe lines, regulating stations, measuring equipment and other equipment, facilities, and installations, used or useful for the distribution or supply of natural gas and incurred after the date hereof and up to and including the last day of such contract year.

(2) The gross revenues of the Buyer from the sale of natural gas during such contract year.

(3) All costs of maintaining and operating the pipe lines, regulating stations, measuring equipment and other equipment, facilities and installations owned by the Buyer and used or useful for the distribution or supply of natural gas by the Buyer (including its manufactured gas plant required to be maintained as an emergency and a stand-by plant in connection with the distribution of natural gas) for such contract year, such costs to include all expenditures [fol. 743] made for current operation and ordinary maintenance and all general administrative and office expense prop-

erly chargeable to the operation and maintenance of such pipe lines, regulating stations, measuring equipment and other equipment, facilities, and installations owned by the Buyer in connection with the distribution or supply of natural gas by the Buyer and including payments made by the Buyer for the amount of natural gas delivered by the Seller to the Buyer hereunder during such contract year and any and all reasonable costs of operation and maintenance not otherwise enumerated.

(4) All reasonable charges for such contract year which may be agreed to by the Seller and which previous operation of the Buyer's system for the distribution or supply of natural gas indicates to be reasonably necessary for the purpose of maintaining funds or reserves to be used in meeting costs of renewals, replacements, or extraordinary maintenance not covered by expenditures for current operations or ordinary maintenance.

(5) An annual amount necessary on a fifteen year six per cent sinking fund basis to amortize the Buyer's investment under clause (b) of (1) above in pipe lines, regulating stations, measuring equipment, and other equipment, facilities and installations owned by the Buyer and used or *or* useful for the distribution or supply of natural gas: provided, however, that there is not to be included in this [fol. 744] amount any sum to amortize any portion of the Buyer's facilities after such portion has been installed for more than fifteen years, nor any sum or item to amortize any item which is provided for in (3) or (4) above, or which should have been a renewal or replacement or operating or maintenance expense prior to fifteen years after the date when the Seller begins to deliver gas to the Buyer hereinunder. The replacement of any of the pipe lines, regulating stations, measuring equipment, or other equipment, facilities or installations shall not prevent the completion of the amortization of the original.

(6) All taxes payable during such contract year because of the ownership or operation by the Buyer of the pipe lines, regulating stations, measuring equipment, or other equipment facilities or installations owned by the Buyer and used or useful for the distribution or supply of natural gas, including said manufactured gas plant.

(7) Six per cent of the Buyer's investment, as above defined, on the last day of such contract year (without

deduction for or reference in any manner to funds or reserves accrued and held for the purpose of extraordinary maintenance, renewals, replacements, or amortization.

(8) The net surplus or net deficit of the Buyer for such contract year as determined by substracting from the gross revenues set out in (2) above, the sum of the amounts set [fol. 745] out in (3), (4), (5), (6) and (7) above.

Eleventh. It is understood and agreed by the parties hereto that the amount of the combined net surpluses or combined net deficits of the Buyer and the Seller for each contract year, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall (until after the provisions of the next succeeding paragraph shall have become operative) be equally divided between the Buyer and the Seller by a cash adjustment to be made each year as soon as possible after the rendering of the statements provided for in Articles Ninth and Tenth hereof, and at the same time the parties shall agree upon such adjustments, if any, in the rates set forth in Article Sixth hereof as may be calculated to be necessary in order as nearly as possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years.

If in any contract year (a) all the net deficits of both parties for all contract year up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective [fol. 746] contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the Seller and thereafter no further changes in the rates set forth in Article Sixth hereof (or in such rates as theretofore adjusted under the foregoing provisions of the Article Eleventh) shall be made except such changes in such rates, if any, as may be required under the provisions of the next succeeding paragraph of this Article Eleventh. In all subsequent contract years, the entire balance of the Buyer's net surplus for each subsequent contract year over and above an amount equal to

one and one-half per cent of the amount of the Buyer's investment shown under (7) of the statement rendered under Article Tenth for such subsequent contract year shall be paid to the Seller.

In each and every contract year during the continuance of this Agreement or any extension thereof after (A) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (B) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the Buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, and (C) in addition thereto, the Seller shall have received from [fol. 747] the combined net surpluses, as shown by such statements, net earnings affording it a reasonable return in view of the hazards of the undertaking of the Seller at the inception thereof, upon the respective amounts of the Seller's investment shown under (7) of the statements rendered under Article Ninth for all contract years up to such time, then the Seller and the Buyer agree to and will cooperate to bring about a reduction in the rates to be charged by the Buyer to its customers in the following manner:

1. The parties shall agree upon such adjustment in the rates set forth in Article Sixth hereof (or in such rates as theretofore adjusted under this Article Eleventh) as may be calculated to be necessary in order as nearly as possible to reduce the operating expenses of the Buyer in subsequent contract years by an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph, and

2. The Buyer shall then reduce its rates to its consumers in such amount as may be calculated to be necessary in order as nearly as possible to effect a reduction in the gross revenues of the Buyer for ensuing contract years in an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph. It is agreed that such reduction of rates by the

Buyer pursuant to the provisions of this paragraph of this Article Eleventh, shall be applied first toward lowering the price of gas to domestic consumers.

Each party shall have the right to examine the books, records, vouchers, and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or adjustment made pursuant to the provisions of [fol. 748] any Article hereof. If such examination reveals any inaccuracy in the statements, charges, or adjustments theretofore made, the necessary adjustment shall be promptly made.

The City of Memphis shall have the right by a reputable firm of certified public accountants or engineers, appointed by resolution of the City Commissioners, to examine the books and accounts of the parties hereto to the extent necessary to verify the accuracy of any statement or adjustment made under or pursuant to the provisions of said Articles Ninth, Tenth or Eleventh. If such examination reveals any inaccuracy in the statements or adjustments theretofore made, the necessary adjustments shall be promptly made.

Twelfth. The Seller agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption of supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure, or shortage of production of gas wells or fields, breakage or accident to lines or equipment, fires, strikes, riots, floods, earthquakes, and other acts of whatever nature due to causes beyond its control, and interruptions by governmental or court orders. The Seller shall only be bound to furnish natural gas to the full extent that it may be able to do so through the exercise of reasonable care and diligence in the procuring of natural gas from its gas purchase contract or contracts, and in the transportation thereof through its lines to the point of delivery and [fol. 749] for such period of time as natural gas is available. It is expressly agreed by the Buyer that the Seller may interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressing station equipment and machinery, but only for such time as may be reasonable or unavoidable, and the Seller shall give to the Buyer except in case of an emergency, reasonable notice of its intention so to do and shall

endeavor to arrange such interruption so as to inconvenience the Buyer and the other consumers of the Seller as little as possible. Nothing herein shall in any way abridge the right of the Seller at any time to sell, transport and deliver natural gas to others than the Buyer, or restrict or reserve the Seller's properties or any part of them for the exclusive benefit of this contract, but the Seller shall not give other contracts entered into subsequent to the date of this contract any priority or preference above the obligations hereunder. In case of shortage of gas and necessity for curtailment, delivery of gas quotas to the Buyer and such other customers to which the Seller may sell natural gas shall be on a pro rata basis; but the Seller and Buyer agree that as to consumers supplied with gas by them or either of them the supply to patrons classified as domestic consumers shall be given preference over the supply to industrial users. For the purpose of this agreement, any person, firm or corporation paying the regular domestic [fol. 750] rate shall be deemed a domestic consumer.

Thirteenth. It is understood that Seller purposes to obtain its natural gas for delivery hereunder from a gas purchase contract or contracts with owners of lands in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, in the fields commonly known as the Monroe Gas field and the Richland Gas field, and Seller shall not be required to supply hereunder natural gas from any other source, but Seller shall have the right if it so elects to supply hereunder natural gas from other sources, provided such other natural gas is not substantially inferior in quality to the natural gas then being produced from said Monroe and/or Richland gas fields.

Fourteenth. The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that the Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. The seller is to tender delivery to the Buyer only of natural gas which is commercial in quality and condition and of an average gross heating value of not less than 950 b. t. u. per cubic feet.

All deliveries of natural gas hereunder shall be at a pressure at a point of delivery of at least 100 pounds gauge per square inch.

[fol. 751] Fifteenth. This agreement shall continue for fifteen (15) years from the day when the Seller's natural gas pipe line from the Monroe Field to Memphis, Tennessee is ready to deliver natural gas hereunder.

The Seller agrees to give the Buyer at least three (3) months notice of the day when its said pipe line will be ready to deliver gas and the Seller agrees to be ready to deliver natural gas at the maturity of said notice.

If at the end of said period of fifteen (15) years hereinabove mentioned and referred to, the Seller has natural gas available to continue supplying the Buyer with gas, then this agreement shall be and it hereby is extended on all the same terms and conditions as hereinabove set forth (except as to the price to be paid the Seller for the gas during the extension period) for a period of ten (10) years from and after the expiration of such fifteen (15) years, or if the Seller's gas supply is not sufficient for ten (10) years, then for such period less than ten (10) years during which the Seller has natural gas so available. The price to be paid the Seller for gas hereunder after the end of said first fifteen (15) years hereinabove mentioned shall be the then reasonable price therefor, and if not otherwise agreed to by the parties hereto at least six (6) months before the end of such fifteen (15) years, shall be determined by a Board of Three Arbitrators to be selected as follows: Either of the parties hereto may at any time after the beginning of such last [fol. 752] mentioned period of six (6) months notify the other party hereto of the name of an arbitrator and if such other party shall fail within twenty (20) days to name a second arbitrator then the party who first served the notice may on reasonable notice to the other party apply to the person who is the Judge then senior in office of the District Court of the United States of America having jurisdiction for the Western Division of the Western District of Tennessee or any Federal Court of similar jurisdiction in said Division for the appointment of such second arbitrator for or on behalf of the other party in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties hereto may in like manner on reasonable notice to the other party apply to

the person who is such Judge for the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as the third arbitrator. The Board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the price thus to be paid for such gas.

[fol. 753] The action of a majority of the members of such Board shall govern and their decision shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Sixteenth: In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers [fol. 754] and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, sudden partial or entire failure of natural gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

Seventeenth: Unless otherwise provided, all notices to be given hereunder by the Seller to the Buyer shall be given by registered mail or by delivering same to the Buyer at its office at Memphis, Tennessee, or at such other office

as may be hereafter designated by the Buyer for the purpose, and all notices to be given by the Buyer to the Seller shall be given by registered mail or by delivering the same to the Seller at its office at Memphis, Tennessee, or at such other offices as may be hereafter designated by the Seller for the purpose.

Eighteenth: This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Whenever any corporation is referred to herein, such reference shall be deemed to include the successors and assigns of any such corporation.

Nineteenth: As between the parties hereto, the Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to [fol. 755] the Buyer at the place of delivery, after which delivery the Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

In witness whereof, the parties hereto have caused this agreement to be duly signed by their respective officers as of the day and year first written above.

Memphis Natural Gas Company. By Birger L. Johnson; Vice-President.

Attest: E. F. Berberich, Secretary.

Memphis Power & Light Company. By L. H. Parkhurst, Vice-President.

Attest: H. L. Martin, Asst. Secretary.

[fol. 756] State of New York,
County of New York, ss:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came L. H. Parkhurst, to me known, who, being by me duly sworn, did depose and say that he resides in Montclair, New Jersey; that he is Vice President of Memphis Power & Light Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the

Board of Directors of said corporation and that he signed his name thereto by like order.

Mary J. Guilfoyle, Notary Public. Commission expires March 30, 1929.

[fol. 757] STATE OF NEW YORK,
County of New York:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came Birger L. Johnson, to me known, who, being by me duly sworn, did depose and say that he resides in New Rochelle, New York; that he is the Vice President of Memphis Natural Gas Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

McLane Tilton III, Notary Public. Commission expires March 30, 1929.

[fol. 758] EXHIBIT "A" TO AGREEMENT

Ordinance Granting Natural Gas Franchise to Memphis Power and Light Company

[fol. 759] An Ordinance granting to the Memphis Power & Light Company, its successors and assigns, a natural gas franchise and the right to construct, maintain and operate a natural gas distribution system in the City of Memphis, Tennessee; and to lay and maintain pipes, mains, conduits, and laterals, and establish equipment and appurtenances thereto in Memphis, Tennessee; for the purpose of supplying natural gas for industrial, domestic and/or other uses; and prescribing the restrictions, conditions and duties pertaining thereto.

Be it ordained by the Board of Commissioners of the City of Memphis:

Section 1. That there be and hereby is granted to Memphis Power & Light Company, its successors and assigns

(hereinafter referred to as the grantee) the right, privilege and franchise until July 1, 1958, to construct, maintain and operate in, on through and along the present and future streets, avenues, alleys and other public places (including bridges and viaducts where they are of sufficient strength) in the City of Memphis, Tennessee, as now or hereafter constituted, mains, pipes, boxes, laterals, conduits, service extensions, reducing and regulator stations, together with all necessary appurtenances for the purpose of transporting, selling, distribution or supplying natural gas for industrial, domestic and/or any other purpose upon the terms and conditions provided in this ordinance to said City and to the inhabitants thereof and to persons, firms or corporations outside the limits thereof.

Section 2. That, within sixty (60) days (unless this time be extended in writing by mutual agreement), after the [fol. 760] passage of this ordinance and its approval by the Tennessee Railroad and Public Utilities Commission, there shall be filed with the City Clerk of said City the written acceptance by the grantee of the provisions, terms and conditions of this ordinance and counterparts of the contracts referred to in Section 3 hereof as exhibits "A" "B" and "C", executed by the several parties thereto. Such acceptance shall be duly acknowledged by some official authorized to administer oaths. If such acceptance and/or such executed contracts be not so filed, this ordinance shall be void. When accepted as provided in this section, the ordinance and acceptance thereof shall constitute a contract between the said City and the grantee, and shall be binding upon them and the successors and assigns of each of them.

Section 3. As a condition precedent to the taking effect of this ordinance, there shall have been filed with the City Clerk of said City specifications showing the method of construction and installation of said pipe line by the hereinafter described pipe line corporation, and there shall have been made, entered into and executed valid and binding contracts between the grantee and a corporation (that shall have filed its charter with the Secretary of State of Tennessee, and otherwise complied with the foreign corporation statutes of the State of Tennessee, if not a Tennessee corporation), engaged or authorized to engage in the construction, operation and maintenance of a pipe line or

lines for the transportation of natural gas to Memphis, Tennessee, and a contract between said pipe line corporation and a natural gas producing corporation for the fur- [fol. 461] nishing of natural gas to said pipe line corporation, which specifications and contracts shall be approved by the Board of Commissioners of the City of Memphis, as hereinafter in this Section provided, and which contract or contracts shall contain provisions substantially to the following effects:

(a) That said pipe line corporation agrees to construct and put in operation a pipe line to supply natural gas to the grantee, with and initial delivery capacity at Memphis of not less than sixty million (60,000,000) cubic feet per day of twenty-four (24) hours, which shall be capable of expansion by the installation of additional compressor stations, from a site at or near Fowler, Louisiana, to a point at or near the corporate limits of the City of Memphis, Tennessee.

(b) That said natural gas producing corporation agrees with said pipe line corporation, that, at the date when deliveries of gas are required to begin under said contract, it will own lands and gas leases, and/or will have gas purchase contracts with the owners of lands and/or gas leases covering thirty-five thousand (35,000) acres of land within what is commonly known as the "proven gas areas" of the Monroe gas field and the Richland gas field in the State of Louisiana, and that it shall not give other contracts, entered into subsequent to the date of said contract, any priority or preference above the obligations thereof, and, in the event of any shortage in the supply of natural gas, domestic consumers shall be given preference over the supply to industrial users, and that, upon the expiration of said contract, same may be renewed for a further period of time [fol. 462] at the then reasonable price of natural gas.

(c) That said pipe line corporation and the grantee will render annual statements to the City of Memphis, showing in reasonable detail the investment of said pipe line corporation and the grantee, as defined in said contract, their respective gross revenues, costs of operation and net earnings, all as therein defined, and that the City of Memphis shall have the right, by or through a reputable certified public accountant and/or a reputable engineering firm to

inspect the books and records of said pipe line company and the grantee, for the purpose of verifying any and all such financial statements.

That, when said pipe line corporation shall have received from its net earnings an amount affording it a reasonable return, in view of the hazards of the undertaking of the pipe line corporation at the inception thereof, upon the amounts of its said investments, then the pipe line corporation and the grantee agree to and will cooperate to bring about a reduction in the rates to be charged by the grantee to its customers, such reduction in rates to the customers of the grantee to be applied first toward lowering the price of natural gas to domestic customers.

In compliance with the provisions in this section above set out, drafts of contracts between said pipe line corporation and the grantee, marked respectively, "A" and "B", and a draft of a contract between said natural gas producing corporation and said pipe line corporation, marked Exhibit "C", and a copy of specifications, marked Exhibit "D" showing the method of construction and installation of said pipe line corporation and showing also the type and character of material to be used by said pipe line cor- [fol. 763] poration and showing also the type and character of material to be used by said pipe line corporation in installing said pipe line, have been filed with said Clerk on May 24th, 1928, and upon and by the final passage of this Ordinance, said contracts and specifications are approved, and on the due and proper execution of said contracts, or duplicate copies thereof, and the filing of executed counterparts of said contracts with the City Clerk, and the acceptance of this franchise, as above provided, then the foregoing provisions of this Section shall be conclusively deemed to have been complied with, and this franchise shall become effective.

Section 4. As one of the considerations for the granting of this franchise, the following things shall be done:

The said pipe line corporation shall begin construction of a pipe line to transport natural gas to Memphis, Tennessee, and the grantee shall begin the construction of ways and means for distributing the said natural gas to industrial and domestic users within said City, within thirty (30) days after the acceptance of this Ordinance; and they both shall continue their respective constructions without unnec-

essary interruptions and with reasonable diligence, and shall respectively complete said pipe line and distribution system within one year from the date of such commencement thereof, subject, however, to extensions equalling any and all delays in such construction caused by the acts of God, strikes, lock-outs, court orders, governmental authority, and other causes beyond their control.

Section 5. That all excavations or removals of any pavement, curbing or sidewalk made by the grantee in any street [fol. 764] or avenue, or public place in said City shall be done in a workmanlike manner, shall be only for such time as shall be reasonably necessary to accomplish the purpose for which the same is done, shall be by the grantee and at its expense promptly restored to the previous condition thereof, all under the supervision of the Commissioner of Streets, Bridges and Sewers of said City or such City officer or department as may at the time be vested with jurisdiction over the streets, avenues, alleys or public places of said City, and shall be done in conformity with such ordinances and reasonable regulations as may at the time be in force in said City relative thereto. All pipes, regulators, and appliances shall be located in such portion of said streets, avenues and public places as may be approved by the Official, department or agency of said City having authority thereover. All construction of pipes, mains, works or equipment of any kind under authority hereof shall be done in a wor-manlike manner (and the grantee shall take reasonable precaution for the protection of the public, both persons and property, in such construction.

As a condition precedent to the grantee's being authorized to do any construction hereunder and before the beginning of same, it shall deposit with the City Clerk of said City, a bond with a surety company or other reasonable party as surety, naming said City as obligee, in the sum of Fifty Thousand Dollars ($50,000), conditioned that the grantee will perform the obligations herein relative to restoring excavations, pavements, curbings, or sidewalks, and that the grantee will indemnify and hold harmless said City from any, every and all claims or suits for damages to [fol. 765] persons or property, and from every other claim which may arise on account of the construction, maintenance, or operation by the grantee of any mains, pipes, works, appurtenances, or equipment under the terms of

this grant. Such bond for said amount shall be kept in force and on file with the said City Clerk during the life of this Ordinance. Grantee shall, during the term fixed in this Ordinance, make such reasonable extensions of its distribution lines in said City as shall be required by order or ordinance of the body, commission or tribunal having jurisdiction thereover, at the time of making such order or passing such ordinance.

The bond hereinabove required, shall be a continuing bond, and in the event the Grantee and/or surety shall be called upon to pay any sums as damages or otherwise on account of the construction, maintenance, and operation by the grantee of any pipes, mains, appurtenances or equipment under the term of this grant, the amount of said bond shall not be diminished by such damages as may be recovered but shall be a permanent and continuing bond in the sum of Fifty Thousand Dollars ($50,000).

Section 6. That the Grantee shall file in the office of the Commissioner of Public Utilities of said City full and complete maps or plats showing the exact location, depth and size of all gas mains laid under this ordinance in the streets, [fol. 766] avenues, alleys or public places of said City, showing the location of all gates, gauges, and other service construction under this ordinance. Said maps and plats shall be corrected each six months to show changes and additions of every kind.

Section 7. That the Grantee may from time to time make reasonable rules and regulations with reference to the sale and distribution of gas hereunder and the conduct of the business herein authorized, as it may see fit, subject to the approval of whatever governmental authority may at the time of the making of such rules have jurisdiction thereover, and the grantee may likewise from time to time change said rules and regulations subject to such approval provided, however, that nothing in this Ordinance contained shall be construed as waiving the right of either the City or the grantee to have reviewed by the courts in such manner as is now or may hereafter be provided by law any findings of such governmental authority as may from time to time have jurisdiction over such rules and regulations.

Section 8. That said City shall enact all needful and proper ordinances to protect the grantee, its property and

its distribution system and every part thereof from damages, imposition and frauds and to prevent unnecessary and unreasonable waste of gas by consumers, but said City shall incur no liability for any failure on its part to enact or to [fol. 767] enforce any such ordinance.

Section 9. That the natural gas to be supplied to said City and its inhabitants under the terms hereof shall be of merchantable quality, and supplied to the consumers' meters at such pressure as may be necessary to provide adequate service to such consumers. Natural gas containing Nine Hundred (900) British Thermal Units gross per cubic feet shall be deemed the minimum to meet the above requirements, as to heating value.

The schedule of rates hereinafter set forth shall be based on Nine Hundred Fifty (950) British Thermal Units gross per cubic foot. If the natural gas delivered under this franchise is reduced and contains less than Nine Hundred Fifty (950) British Thermal Units gross per cubic foot, then the rates therefore charged to the consumer shall be proportionately reduced; provided, however, that a temporary deficiency in B. T. U.'s of 5% will not call for a reduction in rates if such deficiency does not continue longer than twelve (12) hours. For the purpose of ascertaining the standard of gas so furnished, the grantee shall cause tests to be made with a continuous recording calorimeter and checked weekly by use of Junker's Calorimeter (or other standard Calorimeter) at the point at or near the corporate limits of the City of Memphis, where said gas is delivered to the grantee, by a competent person or persons, and a report of said tests shall be duly filed with the [fol. 768] Commissioner of Public Utilities of the City of Memphis.

Section 10. The grantee agrees that it will use its best efforts to obtain and to supply at all times a continuous, sufficient and adequate quantity of gas for use by consumers, to extend the mains, lines and distribution system, and to increase said supply, pressure and flow of said gas to meet the increasing needs and requirements of the consumers of said city so long as same is available at the Monroe or Richland gas fields.

Section 11. That the grantee shall have the right temporarily to discontinue distribution of gas through its dis-

tribution system or any portion thereof for the purpose of making repairs or extensions, and shall not be liable to said City or any consumer for any damages occasioned by such temporary cessation of the delivery of gas, provided such repairs and extensions are made with reasonable diligence, and provided further where the grantee may reasonably do so, it shall give notice of such discontinuance of the supply of gas either in writing clearly addressed to the consumer, postage attached, and deposited in the United States Mail in Memphis, Tennessee, or by telephone or other verbal notification.

Section 12. That the grantee shall be entitled to charge and collect from consumer for all gas furnished between regular monthly meter readings the following schedule of [fol. 769] rates per thousand cubic feet of gas, to-wit:

Schedule for Domestic Service

For All Gas Sold for Domestic Service for Use in Residences Only

$.80 Net per meter month for the first 400 cubic feet or any fraction thereof.

1.10 Net per 1000 cubic feet for the next 2600 cubic feet per month.

.60 Net per 1000 cubic feet for all gas in excess of 3000 cubic feet per month.

Schedules for Commercial Service

For All Gas Sold for Use in Commercial Establishments

$.50 Net per meter per month per 500 cubic feet or less of maximum daily demand and

.10 Net per meter per month per 100 cubic feet of maximum daily demand in excess of 500 cubic feet of maximum daily demand plus

1.20 Net per 1000 cubic feet for the first 3000 cubic feet per 500 cubic feet or less of maximum daily demand and .60 Net per 1000 cubic feet for all excess.

Schedule for Commercial Heating

For all gas sold for use as fuel under steam or hot water boilers in central heating plants in buildings other than private residences during the months of October to March, inclusive:

$1.00 Net per meter per month per 1000 cubic feet of maximum daily demand plus

.30 Net per 1000 cubic feet for the first 100,000 cubic feet per month.

.25 Net per 1000 cubic feet for the next 1,400,000 cubic feet per month.

.22 Net per 1000 cubic feet for all excess.

The minimum bill per month will be based on 1000 cubic feet of maximum daily demand.

Schedule for Industrial Service

For all gas sold for use in plants for industrial purposes. Incidental use of gas for heating in such industrial plants [fol. 770] will be included:

$50.00 per meter per month for the first 10,000 cubic feet of maximum daily demand or less.

1.00 per meter per month per 1000 cubic feet of maximum daily demand for the next 90,000 cubic feet maximum daily demand.

.50 per meter per month per 1000 cubic feet of maximum daily demand for all in excess of 100,000 cubic feet of maximum daily demand plus

.20 per 1000 cubic feet for the first 1,500,000 cubic feet per month.

.18 per 1000 cubic feet for all gas in excess of 1,500,000 cubic feet per month.

The minimum bill per month will be $50.00.

An additional charge of 5% shall be made if any monthly bill is not paid within a prompt payment period of not less than 10 days.

Section 13. That the grantee may make special contracts with consumers at less than the schedule rate in force, the rate to be charged in such instances being based on the amount of gas used and the particular conditions obtaining in such instance or instances, which special rate shall be the same to all consumers using the same amount of gas under the same contract conditions, and schedules of such special rates and the contract conditions to which they shall apply shall be filed with the Commissioner of Public Utilities, and each change or modification thereof shall also be filed with said Commissioner and shall be open to public inspection.

Section 14: Subject to the power of any Governmental authority having jurisdiction thereover to control the same, [fol. 771] (a) The Board of Commissioners of the City of Memphis shall have the right, at all reasonable times, to supervise and inquire into the reasonableness of all schedule charges and rates for furnishing gas for domestic, boiler, industrial and other sources, to the end that the consumers of gas in said City shall be required to pay only a reasonable price for same, and shall not be subjected to exorbitant charges for gas purchased and consumed pursuant to the granting of this franchise; and (b) there shall be no increased in the rates and schedules to be paid for such natural gas without the consent and approval of the Board of Commissioners of the City of Memphis.

Section 15. The Board of Commissioners of said City reserves the right to inspect the machinery and appurtenances used to furnish gas under this franchise, and grantee agrees that all such machinery and appurtenances will be maintained in good condition and of such approved designs as shall efficiently and properly furnish gas of the standard and pressure required by Section 9 hereof.

The grantee shall be obligated to pay the meter inspection fees required by Sections 784 to 789, both inclusive, and 1248 to 1250, both inclusive, of Hughey's Digest of the laws, ordinances and contracts of the City of Memphis, 1909.

Section 16. That nothing in this ordinance shall be con- [fol. 772] strued as in any way affecting the present gas franchise of the grantee, and the grantee shall continue to maintain its manufactured gas plant in accordance with its present gas franchise as an emergency and stand by plant in connection with the distribution of natural gas, and pursuant to and in fulfillment of its obligations under its present gas franchise shall, so long as it shall continue to distribute natural gas, furnish in each calendar year, free of cost to the City of Memphis, natural gas to the amount of One million, Five Hundred Thousand (1,500,000) cubic feet.

Section 17. That in case of failure on the part of the grantee, its successors and assigns, to comply with any provision of this Ordinance, or if said grantee, its successors or assigns, shall do or cause to be done any act or thing prohibited by or in violation of the terms of this ordinance, said City shall have the right to forfeit all of the rights,

powers and privileges granted by this Ordinance, and the same shall thereupon cease, terminate and become null and void; provided, however, that before any forfeiture can be declared, said City shall first serve written notice upon the grantee, and if there be a deed of trust or mortgage upon the property of the grantee, filed in the office of the Register of Deeds for Shelby County, Tennessee, from which may be ascertained the name or names or address or addresses of the Trustee or Trustees under such deed of trust or mortgage, then said City shall cause a notice to be served upon [fol. 773] said mortgagee or trustee or trustees, under such mortgage or deed of trust, which notice shall be given by registered mail and shall notify the grantee, its successors or assigns, and such mortgagee, trustee or trustees, of the essential particulars in which said City claims said Ordinance to have been violated, and which it is claimed gives said City a right to forfeit this franchise, and if said grantee, its successors or assigns, or any one of *for* them, shall within ninety (90) days from the date of the mailing of such notice comply with the conditions of the franchise complained of in said notice, then said franchise shall not be forfeited, and all rights of the grantee, its successors and assigns hereunder shall be fully restored. If there be any bona fide dispute between the grantee, its successors and assigns, and said City as to whether there exists a violation of the terms of this Ordinance, and the grantee institutes a suit to determine the fact as to such controversy, then the grantee shall have sixty (60) days after the final decision in said suit that the Ordinance has been so violated within which to comply with the terms of the Ordinance, provided, however, that if at the expiration of said sixty (60) days the grantee shall not have complied with, or made good the terms of this Ordinance in the respect in which such final decision shall have determined that this Ordinance has been violated, then the grantee shall, at the expiration of said sixty (60) days, cease to exercise any rights, powers or privileges under the terms of this Ordinance.

[fol. 774] Section 18. That this franchise shall not be transferred, assigned, merged, sold or otherwise disposed of without the written consent and approval of the Board of Commissioners of the City of Memphis. The provisions of this Section shall not, however, affect the right of the grantee to subject this franchise and any property operated under it to mortgage.

Section 19. That when the terms, provisions, and conditions of this Ordinance shall have been accepted as hereinbefore provided, they sh .l be binding upon the grantee, its successors and assigns, whether herein otherwise expressly so stated or not, and all the rights, powers, and privileges secured hereby shall be held to inure to the benefit of the grantee, its successors and assigns.

Section 20. That in case any clause, sentence, section, or portion of this Ordinance shall be held to be void by any court, the same shall not affect the validity of the remainder of the Ordinance.

Section 21. That nothing in this Ordinance shall be construed as granting to said grantee any exclusive franchise, rights or privileges.

Section 22. That this ordinance shall take effect thirty (30) days from and after its passage, the public welfare requiring it.

[fol. 775] EXHIBIT B TO TESTIMONY OF BIRGER L. JOHNSON

Agreement Between Memphis Natural Gas Company and Memphis Power & Light Company

[fol. 776] Certificate

I. A. C. Dearth, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copy of an Agreement between Memphis Natural Gas Company and Memphis Power & Light Company, dated May 24, 1928, with the orginal executed Agreement and that the attached copy is a true and complete copy thereof.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 11th day of November, 1938.

A. C. Dearth, Assistant Secretary. (Seal.)

[fol. 777] This Agreement, made and entered into as of this 24th day of May, 1928, by and between Memphis Natural Gas Company, a corporation organized and existing under the laws of the state of Delaware, hereinafter

called the Seller, party of the first part, and Memphis Power & Light Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the Buyer, party of the second part:

Whereas, the Seller desires to sell and deliver to the Buyer and the Buyer desires to purchase natural gas, as hereinafter provided:

Now, Therefore, This Agreement Witnesseth: That the parties hereto in consideration of the covenants and payments herein set forth have covenanted and agreed, and do hereby covenant and agree as follows:

First. This agreement shall take effect if and when the contract of even date herewith between the parties hereto with reference to purchase and sale of natural gas for distribution by Memphis Power & Light Company shall take effect.

Second. The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as the Buyer may need for use as fuel in its electric generating plant or plants (to be not less as a guaranteed minimum than four billion cubic feet in each of the first five years from the date delivery of the gas begins hereunder). Such gas shall be taken by the Buyer in substantially equal monthly amounts, subject, however, to the [fol. 778] same variations as may occur in the load of its generating plant or plants. The Buyer agrees that it will advise the Seller's representatives as far in advance of changes in its demands as operating conditions will permit.

Provided, however, that the Seller shall not be obligated to sell and deliver natural gas in excess of the amounts it has currently available for delivery, as defined in Article Seventh, Eighth and Ninth hereof.

Third. At a suitable place at the Buyer's generating station, to be agreed upon by the parties hereto, the Seller shall furnish, install, operate and maintain at its own expense a regulating and measuring station properly equipped with orifice meters and recording gauges, or other type of meter or meters of standard type as may be mutually agreed upon, the readings and/or records of which shall fix the total amount of natural gas purchased by the Buyer hereunder.

The measuring equipment so installed by the Seller shall be and remain its property. The Seller and the Buyer shall have access to said metering equipment at all reasonable times, but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of the Seller. Charts and records from such metering equipment shall remain the property of the Seller. Upon request of the Buyer, the Seller will submit to the Buyer records and charts from its metering equipment, together with calculations therefrom, for the Buyer's inspection and verification, subject to return by the Buyer, within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by the Seller for [fol. 779] the mutual use of both parties. At least twice each month, and on dates as near the first and sixteenth of the month as practicable, the Seller shall calibrate its meter in the presence of representatives of the Buyer and the parties shall jointly observe any adjustments which are made to the meter should such adjustments be necessary, and if the check meters hereinafter provided for have been installed, the same shall also be calibrated by the Buyer in the present of representatives of the Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may conveniently have its representative present. If, upon any test, any metering equipment is found to be inaccurate by two per cent (2%) or more, registrations thereof shall be correct at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight (8) days. Following any test, metering equipment [fol. 780] found inaccurate shall immediately be restored

as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces gauge pressure above fourteen and sixty-five hundredths (14.65) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and sixty-five hundredths (14.65) [fol. 781] pounds to the square inch; irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods at such time and places, as, in accordance, with good practice, may be agreed upon from time to time between the Seller and the Buyer. For

meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16th) of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first [fol. 782] fifteen (15) days of such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by special test, the special test to be applicable from the day made through the remaining days in such calendar month.

The Buyer may at its option and at its cost and expense install and operate check metering equipment but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The Check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but the Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of the Seller as to type and method of installation.

In the event check metering equipment is installed by the Buyer, the Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by employes or agents of the Buyer. Charts and records from said check metering equipment shall remain the property [fol. 783] of the Buyer. Upon request of the Seller, the Buyer shall submit to the Seller records and charts from said check metering equipment, together with calculatings therefrom for the Seller's inspection and verification, subject to return by the seller within ten (10) days after receipt thereof.

The Seller shall render to the Buyer, on or before the fifteenth (15th) day of each month, a statement of the amount of natural gas sold to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller therefor at the rates for natural gas herein provided for in Articles Fourth and Sixth. Unless exceptions thereto in writing shall be made by the Buyer within ten (10) days after it shall receive such statement, the statements so furnished by the Seller to the Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments then pending.

Fourth. During the first five years from the date delivery of the gas begins hereunde and subject to adjustment in accordance with the provisions of Article Sixth hereof, the Buyer shall pay the Seller monthly for gas purchased hereunder during the preceding calendar month at the rate of (15¢) fifteen cents for each thousand cubic feet of gas.

After the first five years from the date delivery of the gas begins hereunder, the price of gas to be paid by the Buyer shall be on a comparable basis with the cost at that time for the lowest priced fuel available for use in such station or stations.

[fol. 784] The Seller's meters shall be read for billing purposes as nearly as practicable at the end of each calendar month.

Fifth: The Buyer agrees to pay the Seller at its office, Memphis, Tennessee, on or before the twenty-fifth (25th) of the month, for said natural gas sold hereunder during

the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer fail to pay any amount due from it to the other party whom such amount is due, interest thereon shall accrue at six per cent (6%) per annum from the date when such amount was due to the date of payment.

Sixth: It is understood and agreed by the parties hereto that in the event the electric rates being charged by the Buyer at the date of this agreement are hereafter, during the first five years from the date delivery of the gas begins hereunder, required to be lowered by order of the Railroad and Public Utilities Commission of the State of Tennessee or by any other body having jurisdiction over said rates, then the rate to be paid for gas as specified in Article Fourth hereof shall be correspondingly reduced provided, however, that the rate to be paid by the Buyer hereunder for gas for use in its electric generating station or stations shall not be reduced below the comparable cost of producing a kilowatt hour at that time of the lowest priced fuel available for use in such station or stations.

The obligation of the Buyer to purchase gas hereunder [fol. 785] in the guaranteed minimum amount set forth in Article Second hereof shall continue so long as the Seller shall be able to deliver gas for the purposes of this agreement without curtailing the amount which the Buyer may desire to purchase from the Seller under the contract between the parties hereto of even date herewith for the purchase of gas for distribution by the Buyer to others. Whenever the delivery of gas hereunder would so curtail the amount of gas available for purchase by the Buyer under said contract of even date herewith, the parties shall, by agreement, determine to what extent the amount of gas to be delivered and taken hereunder shall be reduced and at what price the gas hereinafter purchased hereunder shall be paid for.

Seventh: The Seller agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption of supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure, or shortage of production of gas wells or fields, breakage or accident to lines or equipment, fires, strikes, riots, floods, earthquakes, and other acts of

whatever nature due to causes beyond its control, and interruptions by governmental or court orders. The Seller shall only be bound to furnish natural gas to the full extent that it may be able to do so through the exercise of reasonable care and diligence in the procuring of natural gas from its gas purchase contract or contracts, and in the transportation therefor through its lines to the point of delivery for such period of time as natural gas is available. It is expressly agreed by the Buyer that the Seller may [fol. 786] interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressing station equipment and machinery, but only for such time as may be reasonable or unavoidable, and the Seller shall give to the Buyer except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruption so as to inconvenience the Buyer and the other consumers of the Seller as little as possible. Nothing herein shall in any way abridge the right of the Seller at any time to sell, transport and deliver natural gas to others than the Buyer, or restrict or reserve the Seller's properties or any part of them for the exclusive benefit of this contract, but the Seller shall not give any other contracts entered into subsequent to the date of this contract any priority or preference above the obligations hereunder. In case of shortage of gas and necessity for curtailment, delivery of gas quotas to the Buyer and such other customers to which the Seller may sell natural gas shall be on a pro rata basis; but the Seller and Buyer agree that as to consumers supplied with gas by them or either of them the supply to patrons classified as domestic consumer shall be given preference over the supply to industrial users. For the purpose of this agreement, any person, firm or corporation paying the regular domestic rate shall be deemed a domestic consumer.

Eighth: It is understood that Seller purposes to obtain its natural gas for delivery hereunder from a gas purchase contract or contracts with owners of lands in the Parishes of Union, Morehouse, Ouachita and Richland, Louisiana, in the fields commonly known as the Monroe [fol. 787] Gas Field, and the Richland Gas Field, and Seller shall not be required to supply hereunder natural gas from any other source but Seller shall have the right if it so elects to supply hereunder natural gas from any other

sources, provided such other natural gas is not substantially inferior in quality to the natural gas then being produced from said Monroe and/or Richland Gas fields.

Ninth: The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that the Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. The Seller is to tender delivery to the Buyer only of natural gas which is commercial in quality and condition and of an average gross heating value of not less than 950 b.t.u. per cubic foot.

Tenth: This agreement shall continue for fifteen (15) years from the date when the Seller's natural gas pipe line from the Monroe Field to Memphis, Tennessee, is ready to deliver natural gas hereunder.

Eleventh: In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure shall be suspended during the continuance of any inability so [fol. 788] caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restra-ing of rulers of people, civile disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, sudden partial or entire failure of natural gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

Twelfth: Unless otherwise provided, all notices to be given hereunder by the Seller to the Buyer shall be given

by registered mail or by delivering the same to the Buyer at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Buyer for the purpose, and all notices to be given by the Buyer to the Seller shall be given by registered mail or by delivering same to the Seller at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Seller for the purpose.

Thirteenth: This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Whenever any corporation is referred to herein, such reference shall be deemed to include the successors and assigns of any such corporation.

[fol. 789] In Witness Whereof, the parties hereto have caused this agreement to be duly signed by their respective officers as of the day and year first written above.

Memphis Natural Gas Company, by Birger L. Johnson, Vice President.

Attest: E. F. Berberich, Secretary.

Memphis Power and Light Company, by L. H. Parkhurst, Vice President.

Attest: H. L. Martin, Asst. Secretary.

[fol. 790] State of New York,
County of New York, ss:

On the 10th day of August in the year one thousand nine hundred and twenty-eight, before me personally came Birger L. Johnson, to me known, who being by me duly sworn, did depose and say that he resides in New Rochelle, New York; that he is Vice President of Memphis Natural Gas Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

McLane Tilton III, Notary Public. Commission expires March 30, 1930.

[fol. 791] State of New York,
County of New York, ss:

On the 10th day of August, in the year one thousand nine hundred and twenty-eight, before me personally came L. H.

Parkhurst, to me known, who being by me duly sworn, did depose and say that he resides in Montclair, New Jersey; that he is Vice President of Memphis Power & Light Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Mary J. Guilfoyle, Notary Public. Commission expires March 30, 1929.

[fol. 792] EXHIBIT C TO TESTIMONY OF BIRGER L. JOHNSON

Agreement Between Memphis Natural Gas Company and West Tennessee Power & Light Company

(Copy)

[fol. 793] Certificate

I, A. C. Dearth, do hereby certify that I am the duly elected, qualified and acting Assistant Secretary of Memphis Natural Gas Company, a corporation created and existing under the laws of the State of Delaware, and I do further certify that I have compared the attached copy of an Agreement between Memphis Natural Gas Company and West Tennessee Power & Light Company, dated May 26, 1931, with the original executed Agreement and that the attached copy is a true and complete copy thereof.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Corporation, this 12th day of November, 1938.

A. C. Dearth, Assistant Secretary. (Seal.)

[fol. 794] This Agreement made and entered into this 26th day of May, 1931 by and between Memphis Natural Gas Company, a corporation organized and existing under the laws of the State of Delaware (hereinafter called the Seller), party of the first part, and West Tennessee Power & Light Company, a corporation organized and existing under the laws of the State of Florida (hereinafter called the Buyer) party of the second part:

Whereas the Seller desires to sell and deliver to the Buyer and the Buyer desires to purchase natural gas as hereinafter provided;

Now, Therefore, This Agreement Witnesseth,

That the parties hereto in consideration of the covenants and payments herein set forth have covenanted and agreed and do hereby covenant and agree as follows:

First. The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as may be requisite to fulfill all contracts made by the Buyer for the sale of natural gas in such part of the State of Tennessee as it may be reasonably and commercially feasible to reach with gas transported through the pipe line of the Seller hereinafter mentioned. The Buyer agrees that it will advise the Seller's representatives as far in advance of changes in its demands as operating conditions will permit.

Provided, However, that the Seller shall not be obligated to sell and deliver natural gas in excess of the amount it has currently available for delivery, as defined in Articles Seventh, Eighth and Ninth hereof.

[fol. 795] In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for sale and/or other disposition and/or other utilization in any municipality or in any territory in the State of Tennessee, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory wherein the Seller desires to sell or distribute natural gas and/or the customer or customers other than the Buyer to whom Seller desires to sell natural gas. The Buyer shall have two months after the receipt of any such written notice in which to elect whether or not the Buyer desires to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to such customer or customers mentioned in such notice from the Seller and to deliver written notice of such election to the Seller. If within any such two months' period the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to such customer or customers, the Buyer shall have five months from the date of the re-

ceipt by the Seller of such written notice of election within which to construct or cause to be constructed the necessary pipe lines to enable it to be ready to begin the distribution and/or sale of natural gas in such territory and/or to such customer or customers. In the event that (1) the Buyer does not within any such two month period deliver to the [fol. 796] Seller written notice of its election to undertake the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) the Buyer is not ready to begin the distribution and/or sale of natural gas in such territory and/or to such customer or customers at the end of five months after the delivery by the Buyer to the Seller of written notice of the Buyer's election to undertake such distribution and/or sale (subject, however, to extensions equalling any and all delays in the Buyer's preparations, or otherwise, occasioned by force majeure as hereinafter defined), it is understood and agreed that in either such event the Seller shall not be required to sell and deliver natural gas to the Buyer hereunder for sale and/or other disposition and/or other utilization in the territory or to the customers specified in such notice or notices of the Seller to the Buyer; but it is further understood and agreed that in either such event the Seller shall have five months from the date on which the Seller shall have thus been relieved of its obligation to sell and deliver natural gas to the Buyer hereunder for sale and/or other disposition and/or other utilization in such territory and/or to such customer or customers within which to construct or cause to be constructed the necessary pipe lines to enable the Seller to be ready to begin the distribution and/or sale of natural gas within such territory and/or to such customer or customers and in the event that the Seller is not ready to begin the distribution and/or sale of natural gas in such territory and/or to such customer or customers at the end of five months after the date on which [fol. 797] the Seller shall have been thus relieved of its obligation to sell and deliver natural gas to the Buyer hereunder for sale and/or other disposition and/or other utilization in such territory or to such customer or customers (subject, however, to extensions equalling any and all delays in the Seller's preparations or otherwise occasioned by force majeure as hereinafter defined), the Buyer and the Seller hereunder shall be deemed to be restored to their original position hereunder in all respects as if none of the

notices and/or other events referred to in this paragraph of this Article First had been served and/or had taken place.

Second. Seller agrees that it will in due course commence the construction of a pipe line commencing at a point on Seller's present line at or near Memphis, Tennessee, which point shall be selected by Seller, and extending either by main lines and/or laterals to points within one thousand (1,000) feet from the corporate limits of the Cities and Towns of Covington, Brownsville, Ripley and Jackson, Tennessee, and, if mutually agreed by the parties hereto, to within one thousand (1,000) feet of the corporate limits of the Town of Humboldt and/or other towns in Tennessee, and, subject to an extension for any delays occasioned by force Majeure as hereinafter defined, will cause said construction to be completed and said line to be ready for the transmission of gas on September 15, 1931. All main lines and laterals shall be of such diameter as shall be recommended by Ralph E. Davis, Engineer, or by any other engineering organization mutually satisfactory to the Seller [fol. 798] and Buyer; provided, however, that in no event shall Seller, without its consent, be required to construct main lines of a diameter greater than twelve (12) inches nor laterals of a diameter greater than ten (10) inches.

Third. The place of delivery of the natural gas deliverable hereunder shall be at taps along the pipe line extension described in the previous paragraph, at such points as shall be hereafter agreed upon by the parties hereto.

All deliveries of natural gas by the Seller to the Buyer shall be at a pressure of at least fifty (50) pounds gauge per square inch but the Seller may make deliveries of gas to the Buyer at the maximum pressures carried in its pipe line at such point or points of delivery. At such point or points of delivery the Seller shall furnish, install, operate and maintain at its own expense a regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard type as may be mutually agreed upon, the readings and/or records of which shall fix the total amount of natural gas delivered by the Seller to the Buyer. The regulating and measuring equipment so installed by the Seller, together with any buildings erected by it for such equipment shall be and remain its property.

The Buyer shall have access to said metering equipment at all reasonable times, but the reading, calibarting and adjusting thereof and changing of charts shall be done only by the employees or agents of the Seller. Charts and rec- [fol. 799] ords from such metering equipment shall remain the property of the Seller. Upon request of the Buyer, the Seller will submit to the Buyer records and charts from its metering equipment, together with calculations therefrom, for the Buyer's inspection and verification, subject to return by the Buyer within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by the Seller for the mutual use of both parties. At least once each month, and on a date as near the first of the month as practicable, the Seller shall calibrate its meters in the presence of representatives of the Buyer and the parties shall jointly observe any adjustments which are made to the meters should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by the Buyer in the presence of representatives of the Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then co-operate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two [fol. 800] per cent (2%) or more registration thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, sixteen (16) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the

amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter, or meters, if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces pressure above fourteen and sixty-five hundredths (14.65) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein provided [fol. 801] for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's Law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and sixty-five hundredths (14.65) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods, and at such time and places as, in accordance with good practice, may be agreed upon from time to time between the Seller and the Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording ther-

mometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined once monthly by joint test on a day as near the first (1st) of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on the first (1st) of the month shall determine the specific gravity to be used in computation for the measurement of natural gas deliveries during such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days of such calendar month.

[fol. 802] The Buyer may at its option at its cost and expense install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the point of delivery as specified herein is on the premises of the Seller, the Seller grants to the Buyer the right of free use and ingress and egress to such metering equipment at all times for the purpose of installation, operation, repair and/or removal. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but the Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of the Seller as to type and method of installation. In the event check metering equipment is installed by the Buyer, the Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by employees or agents of the Buyer. Charts and records from said check metering equipment shall remain the property of the Buyer. Upon request of the Seller, the Buyer shall submit to the Seller records and charts from said check

[fol. 803] metering equipment, together with calculations therefrom for the Seller's inspection and verification, subject to return by the Seller within ten (10) days after receipt thereof.

The Seller shall render to the Buyer, on or before the fifteenth (15th) day of each month, a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller therefor at the rates for natural gas herein set forth in Article Fourth. Unless exceptions thereto in writing shall be made by the Buyer within ten (10) days after it shall receive such statement, the statement of deliveries so furnished by the Seller to the Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments then pending.

Fourth. The price per thousand cubic feet to be paid by the Buyer to the Seller shall be as follows, beginning with the day on which deliveries shall commence hereunder:

(a) For gas purchased for use for domestic consumers 35½¢ for the first three years; 36¢ for the next three years; 36½¢ for the next three years; 37¢ for the next three years and 37½¢ for the next three years. "Domestic consumers" for the purpose of this agreement includes all consumers using natural gas for domestic service and paying the Buyer's domestic rate, such service being the reasonable use of gas for heating, lighting and cooking in private homes, boarding houses, apartment houses, hospitals and charitable institutions; and for lighting, cooking and hot water heating only in hotels, restaurants, bakeries and [fol. 804] stores; for heating hotels and buildings where the heating of the separate rooms depends upon gas used in grates and stoves.

(b) For gas purchased for use for consumers other than domestic consumers, 12¢, plus an amount equal to 50% of the difference between 12¢ and the total amount of the charge per thousand (1,000) cubic feet paid by each such consumer to the Buyer when such charge is not less than 18¢ per thousand (1,000) cubic feet.

(c) For gas purchased for use for consumers other than domestic consumers, 83⅓% of the total amount of the charge per thousand (1,000) cubic feet paid by each such

consumer to the Buyer when such charge is less than 18¢ per thousand (1,000) cubic feet; provided, however, that all contracts for the sale of gas at the rate authorized by this subsection (c) must be entered into by Buyer subject to the approval of Seller.

(d) For all other gas delivered by the Seller to the Buyer at the point or points of delivery during the preceding calendar month 14½¢ (such other gas referred to in this subdivision (d) being herein sometimes called "unaccounted-for gas");

The above prices are based on the prices set forth in the agreement dated May 24, 1928 between Industrial Gas Company and the Seller and in case of any increase or decrease in the prices set forth in such contract with Industrial Gas Company by virtue of any increase or decrease after May 24, 1928 in the gas severance taxes imposed by the laws of the State of Louisiana, the foregoing rates shall be accordingly increased or decreased, as the case may be.

It is understood and agreed that in special cases of industrial consumers whose prospective consumption is un- [fol. 805] usually large, Buyer and Seller may by exchange of correspondence, executed by their respective Presidents or Vice-Presidents, agree that the price which Buyer shall pay for gas sold to such consumers shall, to the extent indicated in such correspondence, be lower that the scheduled prices hereinbefore set forth.

It is understood and agreed that if at any time during the continuance of this agreement the Seller shall make any contract or contracts for the sale and delivery of gas other than to the Buyer at prices lower that the prices provided for in this Article Fourth for similar amounts of gas and under similar conditions, the Buyer shall be entitled to purchase gas hereunder at prices as favorable to the Buyer as the prices provided for in any such contract or contracts.

Fifth. The separation of the total amount of gas purchased by the Buyer into the respective portions purchased for the respective classes of use referred to in subdivisions (a), (b), (c) and (d) of Article Fourth hereof shall, for the purposes of payment, be determined as follows:

(a) Of the total amount of gas purchased hereunder the respective portions purchased for each of the respective purposes referred to in subdivisions (a), (b) and (c) of

Article Fourth hereof shall be considered to be the respective amounts actually sold for each of said respective purposes as determined from the records of the Buyer's meters in connection with said respective uses computed at a pressure of eight (8) ounces above 14.65 pounds absolute (barometric) pressure and on the basis of the temperatures and specific gravity established as hereinbefore provided at the [fol. 806] point or points of delivery for corresponding periods of time. The Buyer shall render to the Seller, on or before the tenth (10th) day of each calendar month, a statement showing the quantities of gas sold for each of the respective purposes mentioned in subdivisions (a), (b) and (c) of said Article Fourth during the preceding calendar month;

(b) The amount of unaccounted-for gas, referred to in subdivision (d) of Article Fourth, shall be determined by subtracting from the total amount of gas delivered by the Seller to the Buyer at the point or points of delivery during the month the amounts of gas purchased for the respective purposes mentioned in subdivisions (a), (b) and (c) of said Article Fourth determined as provided in subdivision (a) of this Article Fifth.

The Seller's meters, at the point or points of delivery, shall be read for billing purposes as nearly as practicable at the end of each month and the Buyer's meters for the records required under subdivision (a) and sub-division (b) immediately preceding shall be read as nearly as practicable as the end of each calendar month.

Sixth. The Buyer agrees to pay to the Seller at its office in Memphis, Tennessee, on or before the twenty-fifth (25th) day of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for, and billed on said monthly statement. Should the Buyer fail to pay any amount due from it to the Seller when such amount is due, interest thereon shall accrue at six per cent (6%) per annum from the date when such amount was due to the date of payment.

[fol. 807] Each party shall have the right to examine the books, records and charts of the other party to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any article hereof.

Seventh. The Seller agrees that it will exercise reasonable diligence and care to avoid any shortage or interruption of supply of natural gas hereunder, but it shall not be liable for any damage or loss that may be occasioned by any shortage or failure, or shortage of production of gas wells or fields, breakage or accident to lines or equipment, fires, strikes, riots, floods, earthquakes, and other acts of whatever nature due to causes beyond its control and interruptions by governmental or court orders or from inability to obtain gas under its then existing gas purchase contracts. The Seller shall only be bound to furnish natural gas to the full extent that it may be able to do so through the exercise of reasonable care and diligence in the procuring of natural gas from its gas purchase contract or contracts, and in the transportation thereof through its lines to the point or points of delivery and for such period of time as natural gas is available. It is expressly agreed by the Buyer that the Seller may interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressing station equipment and machinery, but only for such time as may be reason-
[fol. 808] able or unavoidable, and the Seller shall give to the Buyer except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience the Buyer and the other consumers of the Seller as little as possible. Subject to the provisions of Article First hereof, nothing herein shall in any way abridge the right of the Seller at any time to sell, transport and deliver natural gas to others than the Buyer, or restrict or reserve the Seller's gas supply or properties or any part of them for the exclusive benefit of this contract, but the Seller shall not give other contracts entered into subsequent to the date of this contract any priority or preference above the obligations hereunder. In case of shortage of gas any necessity for curtailment, delivery of gas quotas to the Buyer and such other customers to which the Seller may sell natural gas shall be on a pro rata basis; but the Seller and Buyer agree that as to consumers supplied with gas by them or either of them the supply to patrons classified as domestic consumers shall be given preference over the supply to industrial users. For the purpose of this Article, any person, firm or corporation paying the regular domestic rate shall be deemed a domestic consumer.

Eighth. It is understood that Seller purposes to obtain its natural gas for delivery hereunder from a gas purchase contract or contracts with owners of lands and/gas rights [fol. 809] in the Parishes of Union, Morehouse, Ouchita and Richland, Louisiana, in the fields commonly known as the Monroe Gas Field and the Richland Gas Field, and Seller shall not be required to supply hereunder natural gas from any other source, except that in the event that during the continuance of this agreement the Seller does acquire lands and/or leases and/or gas purchase contracts for gas from other sources Seller shall have the right it it so elects (and if the Buyer so elects, shall be required) to supply hereunder natural gas from such other sources, provided such other natural gas has a heating value of not less that 950 B. T. U's per cubic foot.

Ninth. The natural gas deliverable hereunder shall be natural gas as purchased in its natural state from the wells, except that the Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. The Seller is to tender delivery to the Buyer only of natural gas which is commercial in quality and condition and of an average gross heating value of not less than 950 *T.* T, U's per, cubic foot.

Tenth. This agreement shall continue for fifteen (15) years from the day when the delivery of gas hereunder begins.

If at the end of said period of fifteen (15) years hereinabove mentioned and referred to, the Seller has natural gas available to continue supplying the Buyer with gas, then [fol. 810] this agreement shall be and it hereby is extended on all the same terms and conditions as hereinabove set forth (except as to the price to be paid the Seller for the gas during the extension period) for a period of ten (10) years from and after the expiration of such fifteen (15) years, or if the Seller's gas supply is not sufficient for ten (10) years, then for such period less than ten (10) years during which the Seller has natural gas so available. The price to be paid the Seller for gas hereunder after the end of said first fifteen (15) years hereinabove mentioned shall be the then reasonable price therefor, and if not otherwise agreed to by the parties hereto at least six (6) months before the end of such fifteen (15) years, shall be

determined by a Board of Three Arbitrators to be selected as follows: Either of the parties hereto may at any time after the beginning of such last mentioned period of six (6) months notify the other party hereto of the name of an arbitrator and if such other party shall fail within twenty (20) days to name a second arbitrator, then the party who first served the notice may on reasonable notice to the other party apply to the person who is the judge then senior in office of the District Court of the United States of America having jurisdiction for the Western District of Tennessee or any Federal Court of similar jurisdiction in said District for the appointment of such second arbitrator [fol. 811] for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties hereto may in like manner on reasonable notice to the other party apply to the person who is such Judge for the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as the third arbitrator. The Board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the price thus to be paid for such gas.

The action of a majority of the members of such Board shall govern and their decision shall be final and binding on the parties hereto. Each party shall pay the expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Eleventh: In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make pay- [fol. 812] ments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force maj-ure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force maj-ure shall be

suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint of rulers and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, sudden, partial or entire failure of natural gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

Twelfth: It is understood that Buyer owns and operates and/or contemplates the construction or operation of properties used or to be used in the distribution of natural gas to be purchased hereunder and that the natural gas so purchased is to be sold to industrial consumers and to the general public. It is agreed that if additional natural gas, [fol. 813] whether owned or controlled by the parties hereto or by others, is discovered in commercial quantities within such proximity to the markets served with natural gas purchased hereunder as to enable such additional gas, or any thereof, to be transported and sold or used in competition with that purchased hereunder, Seller and Buyer shall cooperate to find other markets for such additional gas or to make other reasonable disposition thereof, it being understood that Seller shall have sixty (60) days from the date on which Buyer shall have notified Seller of the discovery of such additional gas within which to purchase such additional gas for Seller's use or for sale to Buyer hereunder upon such special terms and conditions as may be agreed upon by Seller and Buyer. Upon the failure of Seller, or of Seller and Buyer acting in cooperation, to find other markets for such additional gas or to make other reasonable disposition thereof, Buyer shall have the right to reduce its purchases of gas from Seller hereunder by the amount of such gas as is necessary in order to enable Buyer's markets to absorb such additional gas or so much thereof as may be necessary in order to protect Buyer's markets. Upon the disappearance of the necessity of such reduction,

Buyer shall resume the taking and Seller shall resume the delivery of Buyer's full requirements hereunder.

Thirteenth: Unless otherwise provided, all notices to be given hereunder by the Seller to the Buyer shall be given [fol. 814] by registered mail or by delivering the same to the Buyer at its office at Jackson, Tennessee, or at such other office as may be hereafter designated by the Buyer for the purpose, and all notices to be given by the Buyer to the Seller shall be given by registered mail or by delivering the same to the Seller at its office at Memphis, Tennessee, or at such other office as may be hereafter designated by the Seller for the purpose.

Fourteenth: As used herein the word "year" denotes a period of twelve (12) months ending on an anniversary of the date on which the delivery of natural gas shall actually commence hereunder; "month" denotes a calendar month; and "day" denotes a period of twenty-four (24) hours, commencing and ending at 7 o'clock in the morning.

Fifteenth: This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Whenever any corporation is referred to herein, such reference shall be deemed to include the successors and assigns of any such corporation.

Sixteenth: As between the parties hereto, the Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to the Buyer [fol. 815] at the place of delivery, after which delivery the Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

In witness whereof the parties have caused this agreement to be duly signed by their respective officers the day and year first above written.

Memphis Natural Gas Company, By H. G. Scott (Signed). (Seal.)

Attest: E. F. Berberick.

West Tennessee Power & Light Company, By E. W. Hill (Signed), Vice-Pres. (Seal.)

Attest: —— —— (Signed).

[fol. 816] STATE OF NEW YORK,
County of New York, ss:

On the 28th day of May in the year One Thousand Nine Hundred and Thirty-one, before me personally came H. G. Scott to me known, who being by me duly sworn, did depose and say that he resides in New York, N. Y.; that he is President of Memphis Natural Gas Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Norman G. Lewis (Signed). Notary Public, Nassau County. Cert. filed in N. Y. Co. No. 400, Reg. No. 2-L-325. Commission expires March 30, 1932. (Seal.)

[fol. 817] STATE OF NEW YORK,
County of New York, ss:

On the 26th day of May in the year One Thousand Nine Hundred and Thirty-One, before me personally came E. W. Hill to me known, who, being by me duly sworn, did depose and say that he resides in New Rochelle, New York, that he is a Vice-President of West Tennessee Power & Light Company, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) Mary J. Guilfoyle, Notary Public, Bronx County. New York County Clerk's No. 451, Register's No. 3G302. Bronx County Clerk's No. 144, Register's No. 110G33. Commission Expires March 30, 1933. (Seal.)

Exhibits D1-D6 To
Testimony of Birger L. Johnson

D 1

Paying Int. & Penalty under protest

ORIGINAL

TAX LEVY

1932

$ 2400

GIBSON COUNTY TAX RECEIPT No. 6073

W. R. DUNLAP, Trustee

Trenton, Tenn. 12-29- 1932

Received of Memphis Natural Gas Co.

Forty and 40/100 DOLLARS

In full payment for Poll, State, County, School and Special Taxes for the year 1932 in District No. Pri C.H. on Property and Poll.

$ 41 40

Poll Tax,	$
Special School,	$
State Tax,	$
County Tax,	$ 38.16
Total,	$
Interest and Penalty,	$ 3.24
Grand Total,	$ 41.40

W. R. DUNLAP, Trustee

By W. R. Dunlap

D 2

ORIGINAL

COUNTY LEVY

County	P. .17
School	.68
Interest and Sinking Fund	.01
Court Road Interest	.01
High Schools	.13
Bridge and Levee	.11
School Bonds 1926	.06
Mar. Road Imp. Bonds	.02
Special Street Bonds	.01
Highway Bonds 1929	.01
Highway Bonds 1931	.01
Short Term Notes 1931	.13
Total County Tax	$1.43
State Tax	.07
Total State and County Tax, 1932	$1.50
Poll	$1.00

MADISON COUNTY TAX RECEIPT No. 1451

Jackson, Tenn. Dec 29 1932

RECEIVED OF Memphis Natural Gas Co.

Six Hundred Seven & 69/100 DOLLARS

Utilities 1932

Poll Tax,	$
State Taxes,	$
County Taxes,	$607.69
Int. and Penalty,	$
TOTAL	$607.69

No. Acres Value $

No. Lots Value $ 41,060.00

Value Personal Property, $

Total Valuation, $

In full payment for Poll, State, County, School, Highway, and Special Taxes for the year 1932, in District No. Ward No. on Poll and Property as listed above.

Trustee.

D. T.

D 3

ORIGINAL

COUNTY LEVY

County Tax	$0.90
Elementary School	.40
High School	.32½
Spec. Tax for Bonds	.40
Total County Tax	$1.32½
Total State Tax	.68
Total	$1.30½
Poll Tax	$2.00

PUBLIC UTILITIES

CROCKETT COUNTY TAX RECEIPT No. 11

W. R. CONLEY, TRUSTEE

Alamo, Tenn. Jan 10 1934

RECEIVED OF Memphis Natural Gas Co.

Nine Hundred and 31/100 Dollars

1932

	$
Poll Tax	$
State Taxes	$
County Taxes	$ 953 1
Int. and Penalty	$
Total	$ 953 1

STATE LEVY

Total State Tax $0.68

No. Acres ; Value, $

No. Lots ; Value, $

Value Personal Property, $

Total Valuation $ 7780

In full payment for Poll, State and County Taxes for the year 1932 in Dist. No. as listed above.

W. R. Butler Trustee

D. T.

10 COUNTY LEVY

County Institutions $ .10

LAUDERDALE COUNTY TAX RECEIPT No. 1975

JULIAN BELTON, Trustee

D 4

LAUDERDALE COUNTY TAX RECEIPT No. 1975

JULIAN BELTON, Trustee

Ripley, Tenn. Dec 17 28 1933

RECEIVED OF Mayo Pipe Natural Gas Co

Seven Hundred Sixteen & 66/100 DOLLARS

1932

Poll Taxes,	$
State Taxes,	$
County Taxes,	$ 660.20
Int. and Penalty,	$
Total,	$ 660.20

In full payment for State and County Taxes in District No. for the year 1932, on Poll and Property as listed above.

Julian Belton Trustee

Special School $ 56.46

716.66

COUNTY LEVY

County Institution	$ .15
County	.20
Elementary School	.40
High School	.20
Sinking Fund	.20
State	.05
Total	$1.20
Poll	$2.00

Off up

No. Acres Value $

No. Lots Value $

Value Personal Property $ 33,010 [illegible]

Total Valuation $ 33,010 [illegible]

D 5

TIPTON COUNTY TAX RECEIPT No. 2529

ORIGINAL

R. P. NEVIL, Trustee

Covington, Tenn. Dec 30 1931

RECEIVED of Memphis Natural Gas

Seven Hundred Sixty Two & 80/100 Dollars

1932

Poll Tax	$
County Taxes	$ 1742.60
State Taxes	$
Total	$ 1742.60
Int. and Penalty	$ 105.67

In full payment for Poll, State, County, School, Highway and Special Taxes for the year 1932, in District No. ____ on Poll and Property as listed above. If tax is paid by check, this receipt is not valid until final payment of the check.

R P Nevil Trustee

G C Bradley D. T.

COUNTY LEVY

General County	$0.35
General School	.30
Highway Bond, Int. & Sink. Fund	.75
General Bridge	.10
County High School	.35
School Bond, Int. & Sink. Fund	.17
Funding Bond, Int. & Sink. Fund	.10
Bridge Bond, Int. & Sink. Fund	.20
Health Unit	.10
Total County	$2.52

STATE LEVY

Elementary and Rural Schools	$0.30
Total	$0.30

No. Acres

Value, $

No. Lots ; Value, $

Value Personal Property, $

Total Valuation $ 34,500

D 6

HAYWOOD COUNTY TAX RECEIPT No. 79

Utility

S. D. MULHERIN, Trustee

Brownsville, Tenn., Dec. 29 1932

RECEIVED OF Mississippi Natural Gas Co

Eight Hundred Eighty Nine 11/100 DOLLARS

1932

Poll Tax,	$
State Taxes,	$
County Taxes,	$
Int. and Penalty,	$
TOTAL	$ 889.11

L. D. Mulherin Trustee.

D.T.

COUNTY LEVY, 1932

County Tax	.35
Elementary School Tax	.30
High School Tax	.15
Highway Tax	.15
Bridge Tax	.15
School Bond Tax	.15
Pollard Aid Bond Tax	.10
Court House Imp. Tax	.10
Haywood County Road Bond Tax	.15
Special Tax	.15
Highway Pension Tax	.15
Funding Bonds	.15
Total County Tax	$1.95

STATE LEVY

State Tax	.80
Grand Total	$1.75

No. Tracts Value $

No. Lots Value $

Value Personal Property, $

Total Valuation, $ 53,240 at

Exhibits D7-D9 To
Testimony of Birger L. Johnson

13 VL 2

CITY TREASURER
DELINQUENT TAX RECEIPT
CITY OF MEMPHIS, TENNESSEE

Nº 11107
176/34

YEAR 1937

Assessed to Memphis Natural Gas Co

D 7

Ward Public Utilities (Supplement)
Lot Co. Lot

Localized 4,000.00 @ 2.16

Valuation		
Amount City Tax Paid		86.40
Interest		
Penalty		
Total Paid		86.40

Receipt Valid When Check is Paid

CITY TAX PAID JAN 8 1938 MEMPHIS

15

BILL 100 DIST. WARD Shelby County, Tenn. 193

STATE OF TENNESSEE } Taxpayers are requested to examine their Tax Bills and see that receipts cover all property upon which they desire to pay. The Trustee cannot call from the tax books the ownership of property, and is in no way responsible for confusion caused taxpayers furnish description of all property upon which they wish to pay. Page Line

Memphis Natural Gas Co

ORIGINAL—TO STATE and COUNTY TAXES FOR 1932

LOT	COUNTRY LOT	BLOCK			
			17 Miles 760	12100	00
Distributable Property			34 Miles @ 300 per mile	10200	00
Localized Property				2891	00
				4000	00
SUBDIVISION:	R.R.T.&T.Co.'s		VALUATION	1970100	

D 8

1932

STATE & COUNTY PAID DEC 29 1932 CO. TRUSTEE MEMPHIS

COUNTY LEVY

County Commissioners (General Fund)	3.11
County Highways (General Fund)	.10
County Elementary Schools	.30
County High Schools	.35
Industrial & Training Schools	.01
Jail Bonds	.055
Interest	.11
County Bridges	.075
Funding and Bonds	.25
Refund Bonds, 1937	.055
Tuberculosis Hospital	.055
Tri-State Fair Bonds	.055
Tuberculosis Hospital Bonds	.055
School Bonds, 1937	.055
Refunding Bonds (Jackson Building)	.055
Normal School Bonds	.055
Total County Tax	5.01

Receipt Void After Dec. 31, 1933

	Total State 50.01 on the $100	1792 79
	Interest at 6 per cent from March 1st, 1933	
County Trustee	Penalty	
By Deputy Trustee	Total Tax	

20

Office of the COMPTROLLER OF THE TREASURY

No. 2514 Nashville, Tenn. Jan. 2 1934

D 9

Received of Memphis Natural Gas Co.

Six Hundred Twenty-two 40/100 DOLLARS

On account of Assessment Tax for the year 1932-33

$311 20 Jan 1932

311 20 " 1933.

$622 40

Roy S. Wallace Comptroller

P.

COUNTY LEVY

County Fund	$ .10
Elementary School	.10
High School	.10
Sinking Fund	.10
Int. & Sinking Fund	.10
Court Tax	.10
School Bldg. 1926	.10
Parkard Add.	.10
Highway Bonds 6%	.10
Highway Bonds 1929	.10
Misc. Bond Int. Maturing	.10
Highway Bonds 1931	.07

1933

STATE OF TENNESSEE
MADISON COUNTY
TAX RECEIPT

ORIGINAL

No. 13074

COUNTY LEVY

Bond Issue 1929	.10
Serial Bonds 6%	.10
Serial 6% Notes	.10
Gen 1934	.10
Total County	$1.10
State Tax	.55
Total State and County Tax 1933	$1.65
Poll	$1.00

NAME	ASSESSMENT: NO. OF LOTS OR ACRES	VALUE: LOTS	VALUE: ACRES	PERSONAL	TOTAL	TAXES: STATE	COUNTY	POLL	TOTAL
Memphis Natural Gas Company.				41,060.			$734.97	1743	$734.97.

INT.
PEN.
TOT.

RECEIVED PAYMENT THIS 29 DAY OF Dec 193[illegible]

A. L. Sawyer
COLLECTOR

D 10

COUNTY LEVY

County Institutions	$ .10
County	.50
Elementary School	.20
High School	.20
Sinking Fund	.20
State	.50
Total	$2.00
Poll	$2.00

LAUDERDALE COUNTY TAX RECEIPT No. 253

JULIAN BELTON, Trustee

Ripley, Tenn. 12-29 1934

RECEIVED OF Memphis Natural Gas Co
Seven hundred sixty & 64/100 DOLLARS

1933

State Taxes,	$
County Taxes,	$ 760.64
Int. and Penalty,	$
Total,	$ 760.64

No. Acres ____ Value $ ____
No. Lots ____ Value $ 1
Value Personal Property $ 33,010
Total Valuation $ 33,010

In full payment for State and County Taxes in District No. ____ for the year 1933, on Poll and Property as listed above.

Julian Belton Trustee

Ripley Special School $ 5.42

D 11

PUBLIC UTILITIES

CROCKETT COUNTY TAX RECEIPT No. 5

W. R. CONLEY, TRUSTEE

Alamo, Tenn. 1-10- 1934

RECEIVED OF Memphis Natural Gas Co
One hundred eight and 92/100 Dollars

1933

Poll Taxes	$
State Taxes	$
County Taxes	$ 108.92
Int. and Penalty	$
Total	$ 108.92

STATE LEVY
Total State Tax .55

No. Acres ____ ; Value, $ ____
No. Lots ____ ; Value, $ ____
Value Personal Property, $ ____
Total Valuation $ 7780

In full payment for Poll, State and County Taxes for the year 1933 in Dist. No. [illegible] as listed above

W F Butler Trustee
D. T.

D 12

D 13

COUNTY LEVY

ORIGINAL

TIPTON COUNTY TAX RECEIPT No. 350

R. P. NEVIL, Trustee

Covington, Tenn. 12-30 1933

RECEIVED of Memphis Natural Gas Co.

Two Thousand Three Hundred Eighty Five & 80/100

1933 Utility

Poll Tax $

County Taxes $ 1385.80

State Taxes $ None

Total $ 1385.80

Int. and Penalty $

STATE LEVY

No. Acres

Value, $

No. Lots Value, $

Value Personal Property, $

Total Valuation $ 54500.00

In full payment for Poll, State, County, School, Highway and Special Taxes for the year 1933, in District No. ... on Property and Poll, as noted for ... quarter.

R. P. Nevil Trustee

D. T.

D 14

COUNTY LEVY

ORIGINAL

GIBSON COUNTY TAX RECEIPT No. 1005

W. E. DUNLAP, Trustee

Trenton, Tenn. 12-29 1933

Receipt of Memphis Natural Gas Co.

Thirty-nine + 12/100 DOLLARS

In full payment for Poll, State, County, School and Special Taxes for the year 1933 in District No. Real U. on Property and Poll, as noted for ... quarter.

39.12

Poll Tax, 2	$
Poll Tax Interest,	$
Special School,	$
State Tax,	$
State Tax Interest,	$
County Tax,	$ 39.12
County Tax Interest,	$
Total	$
Grand Total,	$ 39.12

QUARTER VALUE $ 2400

W. E. DUNLAP, Trustee

By W. E. Dunlap

D 15

COUNTY LEVY, 1933

HAYWOOD COUNTY TAX RECEIPT No. 26

S. D. MULHERIN, Trustee

Utility

Brownsville, Tenn. Dec. 29 1933

RECEIVED OF Memphis Natural Gas Co.

Two Hundred Forty Three 32/100 DOLLARS

1933

Poll Tax, $

State Taxes, $

County Taxes, $

Int. and Penalty, $

TOTAL $ 1043.52

STATE LEVY

No. Trusts Value $

No. Lots Value $

Value Personal Property, $

Total Valuation, $ 43,240.00

S. D. Mulherin Trustee

D. T.

Exhibits D16-D21 To
Testimony of Birger L. Johnson

BILL 108 DIST. WARD 8 Shelby County, Tenn. 193

STATE OF TENNESSEE vs. Memphis Natural Gas Co

Taxpayers are requested to examine their Tax Bills and see that receipts cover all property upon which they desire to pay. The Trustee cannot tell from the tax books the ownership of property, and is in no way responsible for omissions unless taxpayers furnish description of all property upon which they wish to pay.

Page Line

D 16

ORIGINAL—TO STATE and COUNTY TAXES FOR 1933

LOT	COUNTRY LOT	BLOCK			
			12 @ ACRES 2000		62100 00
Distributable Property			34 Miles @ 3000 per mile		102000 00
Localized Property					28910 00
Dealers Corporate Limits					4000 00
SUBDIVISION: R.R.T.&T.Co.'s			VALUATION		197010 00

1933

COUNTY LEVY

County Commissioners	$ .14
Chairman's	.10
Elementary Schools	.30
High Schools	.20
Industrial Schools	.01
Bridges	.01
Turnpike and Roads	.08
Tuberculosis Hospital	.02½
Interest	.11
Jail Bonds	.03½
School Bonds, 1923	.03½
Tri-State Fair Bonds	.02½
Refunding Bonds	.02½
Total County Tax	$1.01

Receipt Valid When Check Is Paid

COUNTY TRUSTEE

[illegible] HASZINGER

	Total Rate $2.13 on the $100	179279
	Interest at 6 per cent from March 1st, 1934	
County Trustee	Penalty	
By Deputy Trustee	Total Tax	$

13

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	Tax	$1.34 on $100
LEVY FOR SCHOOLS	Tax	.65 on 100
LEVY FOR PARKS	Tax	.11 on 100
LEVY FOR SHELBY COUNTY LIBRARY	Tax	.03 on 100
TOTAL RATE		$2.13 on $100

D 17

PUBLIC UTILITIES Supplement
ORIGINAL—FINAL
WARD BILL 106
PAGE 10 LINE 7-8

STATE OF TENNESSEE, VERSUS

Memphis Natural Gas Co

To City of Memphis for Taxes 1933

LOT	COUNTRY LOT	BLOCK	DIMENSIONS	VALUATION
			4000.00 @ 2.13	4,000-

1933

TOTAL TAX	$ 85.20
FINAL QUARTERLY PAYMENT	$
INTEREST	$
PENALTY AND ADV.	$
DISCOUNT	$
NET TAX	$

DISCOUNT
NET TAX

COUNTY LEVY

1934

STATE OF TENNESSEE
MADISON COUNTY
TAX RECEIPT

ORIGINAL

No. 13206

COUNTY LEVY

NAME	ASSESSMENT				TAXES			
	No. of Lots or Acres	VALUE Lots	VALUE Acres	PERSONAL	TOTAL	STATE	COUNTY	POLL	TOTAL
Memphis Natural Gas Co.					47850				823.19

INT.
PEN.
TOT.

RECEIVED PAYMENT THIS 18 DAY OF Jan. 1935
A. D. Belton
TRUSTEE

D 18

D 19

COUNTY LEVY
County Institutions ... .10
County ... .50
Elementary School ... .25
High School ... .50
Sinking Fund ... .75
State ... .50
Total ... $3.50
Poll ... $3.00

LAUDERDALE COUNTY TAX RECEIPT No. 560
JULIAN BELTON, Trustee
Ripley, Tenn. Jan 19 1935
RECEIVED OF Memphis Natural Gas Co.
Seven hundred ninety one & 90/100 DOLLARS

1934

Poll Taxes, $
State Taxes, $
County Taxes, $ 791.90
Int. and Penalty, $
Total, $ 791.90

No. Acres ... Value $
No. Lots ... Value $
Value Personal Property $ 39,595.00
Total Valuation $ 39,595.00

In full payment for State and County Taxes in District No. P.U.
for the year 1934 on Poll and Property as listed above.
Julian Belton Trustee
Special School $

D 20

COUNTY LEVY
County Institutions ... .10
County ... .50
Elementary School ... .25
High School ... .50
Sinking Fund ... .75
State ... .50
Total ... $3.50
Poll ... $3.00

LAUDERDALE COUNTY TAX RECEIPT No. 1866
JULIAN BELTON, Trustee
Ripley, Tenn. July 19 1935
RECEIVED OF Memphis Natural Gas Co
Sixty three & 10/100 DOLLARS

1934

Poll Taxes, $
State Taxes, $
County Taxes, $
Int. and Penalty, $
Total, $

No. Acres ... Value $
No. Lots ... Value $
Value Personal Property $
Total Valuation $

In full payment for State and County Taxes in District No. PU
for the year 1934 on Poll and Property as listed above.
Ripley Julian Belton Trustee
Special School $ 63.12

RECEIVED PAYMENT THIS 18 DAY OF Jan 1935
A. D. Jones
TRUSTEE

D 18

D 19

COUNTY LEVY
County Institutions .10
County .20
Elementary School .55
High School .20
Sinking Fund .75
State .20
Total $2.00
Poll $1.00

LAUDERDALE COUNTY TAX RECEIPT No. 560

JULIAN BELTON, Trustee

Ripley, Tenn., Jan 18 1935

RECEIVED OF Memphis Natural Gas Co.

Seven hundred ninety one & 90/100 DOLLARS

1934

Poll Taxes,	$
State Taxes,	$
County Taxes,	$ 791.90
Int. and Penalty,	$
Total,	$ 791.90

No. Acres Value $
No. Lots Value $
Value Personal Property $ 39,595.00
Total Valuation $ 39,595.00

In full payment for State and County Taxes in District No. P.U.
for the year 1934 on Poll and Property as listed above.
Julian Belton Trustee
Special School $

D 20

COUNTY LEVY
County Institutions .10
County .20
Elementary School .55
High School .20
Sinking Fund .75
State .20
Total $2.00
Poll $1.00

LAUDERDALE COUNTY TAX RECEIPT No. 1866

JULIAN BELTON, Trustee

Ripley, Tenn., July 1 1935

RECEIVED OF Memphis Natural Gas Co.

Sixty nine & 12/100 DOLLARS

1934

Poll Taxes,	$
State Taxes,	$
County Taxes,	$
Int. and Penalty,	$
Total,	$

No. Acres Value $
No. Lots Value $
Value Personal Property $
Total Valuation $

In full payment for State and County Taxes in District No. P.U.
for the year 1934 on Poll and Property as listed above.
Julian Belton Trustee
Ripley Special School $ 69.12

D 21

COUNTY LEVY

1934

ORIGINAL

GIBSON COUNTY TAX RECEIPT No. 1063

W. E. DUNLAP, TRUSTEE

Trenton, Tenn. 1-18-1935

Received of Memphis Natural Gas Co.

Thirty-nine & 12/100 DOLLARS

In full payment for Poll, State, County, School and Special Taxes for the year 1934 in District No. P.U. on Property and Poll.

$ 39.12

Poll Tax,	$
Special School,	$
State Tax,	$
County Tax,	$ 39.12
Interest	$
Total,	$ 39.12

W. E. DUNLAP, Trustee
By W. E. Dunlap

31 OK

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	Tax	$1.34 on $100
LEVY FOR SCHOOLS	Tax	.69 on 100
LEVY FOR PARKS	Tax	.11 on 100
LEVY FOR COSSITT LIBRARY	Tax	.03 on 100
TOTAL RATE		$2.13 on $100

R. R., T. & T. CO.'S
UTILITIES

ORIGINAL—FINAL

WARD BILL 106

PAGE 15 LINE 7

STATE OF TENNESSEE VERSUS

MEMPHIS NATURAL GAS CO

To City of Memphis for Taxes 1934

LOT	COUNTRY LOT	DIMENSIONS	VALUATION
		LOCALIZED	4,000.00
		4,000.00	

1934

TOTAL TAX	$	85.20
FINAL QUARTERLY PAYMENT	$	
INTEREST	$	
PENALTY AND ADV.	$	
DISCOUNT	$	
NET TAX	$	

20 Ck

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	Tax	$1.34 on $100
LEVY FOR SCHOOLS	Tax	.69 on 100
LEVY FOR PARKS	Tax	.11 on 100
LEVY FOR COSSITT LIBRARY	Tax	.03 on 100
TOTAL RATE		$2.13 on $100

R. R., T. & T. CO.'S
UTILITIES

ORIGINAL—FINAL

WARD BILL 106a
SUPPLEMENTED RAISED BY STATE BOARD

PAGE 15 LINE 7

STATE OF TENNESSEE VERSUS

MEMPHIS NATURAL GAS CO. 7 1935

To City of Memphis for Taxes 1934

LOT	COUNTRY LOT	DIMENSIONS	VALUATION
			2,000

1934

TOTAL TAX	$	42.60
FINAL QUARTERLY PAYMENT	$	
INTEREST	$	
PENALTY AND ADV.	$	
DISCOUNT	$	

D22-D27 To
Birger L. Johnson

57

D 24

2b

COUNTY LEVY, 1934

County Tax	$ .20
Elementary School Tax	.65
High School Tax	.28
Highway Tax	.80
Bridge Tax	.04
Federal Aid Bond Tax	.20
Court House Improvement Tax	.04
Hard Road Bond Tax	.34
Funding Bonds	.80
Hospital Tax	.12
Total County Tax	$3.32

STATE LEVY

State Tax	.68
Grand Total	$4.00

HAYWOOD COUNTY TAX RECEIPT

No. 3005

Brownsville, Tenn. 1/18 1935

Received of Memphis Natural Gas Co.

One thousand one hundred sixty one + 87/100 Dollars

for full for Poll, State and County Taxes for the Year 1934, in District 7 of Haywood County, as listed at right.

Rate 1.82 Outside

Utility

No. Tracts ____ No. Town ____ Value $ 63,840

No. of Lots ____ Value $ ____

Value Personal Property ____ $ ____

Total Valuation $ 63,840

POLL TAX	$
STATE TAX	$
COUNTY TAX	$
ELE. SCHOOL TAX	$
HIGH SCHOOL TAX	$
COURT HOUSE IMP. TAX	$
HIGHWAY TAX	$
BRIDGE TAX	$
FEDERAL AID TAX	$
HARD ROAD BOND TAX	$
HOSPITAL TAX	$
INTEREST & PENALTY	$
TOTAL	$ 1,161 87

P. P. McLANAHAN, Trustee

Mrs. D. P. McLanahan, Trustee

D 25

2d

COUNTY LEVY

County Tax	$ .55
Elementary Schools	.22
High Schools	.30
Bonded Dist. Debt and Interest Warrants	.70
Special Tax for payment of Warrants held by County Banks	.05
Special Tax only to payment of Amt. of Judgment of Bolivar	.01
Total County	$1.73
Total State	.06
TOTAL	$1.79
Poll Tax	$2.00

ORIGINAL

PUBLIC UTILITIES

CROCKETT COUNTY TAX RECEIPT

W. R. CONLEY, TRUSTEE

No. 3505

Alamo, Tenn. Jan. 15 1935

RECEIVED OF Memphis Natural Gas Co

Thirteen and Twenty Two and 22/100 Dollars

1934

Poll Taxes	$
State Taxes	$
County Taxes	$ 13.22
Int. and Penalty	$
Total	$ 13.22

STATE LEVY

Total State Tax $0.06

No. Acres ____ ; Value, $ ____

No. Lots ____ ; Value, $ ____

Value Personal Property, $ ____

Total Valuation $ 7780

In full payment for Poll, State and County Taxes for the year 1934 in Dist. No. 2 as listed above

W. F. Butler, Trustee, D. T.

D 26

3D Ch

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	Tax	$1.34 on $100
LEVY FOR SCHOOLS	Tax	.66 on 100
LEVY FOR PARKS	Tax	.11 on 100
LEVY FOR COSBITT LIBRARY	Tax	.03 on 100
TOTAL RATE		$2.13 on $100

R. R., T. & T. CO.'S UTILITIES

ORIGINAL—FINAL

WARD BILL 106a

SUPPLEMENTED RAISED BY STATE BOARD

PAGE 45 LINE 7

STATE OF TENNESSEE VERSUS

MEMPHIS NATURAL GAS CO.

To City of Memphis for Taxes 1934

LOT	COUNTRY LOT	SUBDIVISION	VALUATION
			2,000

1934

TOTAL TAX	$	42.60
FINAL QUARTERLY PAYMENT	$	
INTEREST	$	
PENALTY AND ADV.	$	
DISCOUNT	$	
NET TAX	$	

D 23

BILL 30 DIST. WARD

Shelby County, Tenn. 193

STATE OF TENNESSEE

vs.

Memphis Natural Gas Co.,

Taxpayers are requested to examine their Tax Bills and see that re-ceipts cover all property upon which they desire to pay. The Trustee cannot tell from the tax books the ownership of property, and is in no way responsible for assessments unless taxpayers furnish descriptions of all property upon which they wish to pay.

Page Line

Ch

ORIGINAL—TO STATE and COUNTY TAXES FOR 1934

LOT	COUNTRY LOT	BLOCK	ACRES	
				$9,100.00
Miles @ 34.00	per mile 3,500.00	Distributable Property		119,000.00
Localized Property				38,925.00
SUBDIVISION: R.R.T.&T.Co's		VALUATION		220,025.00

STATE OF TENNESSEE COUNTY OF SHELBY JAN 18 1935 Paid

1934

COUNTY LEVY

County Commissioners	$ .13
Elections	.11
Elementary Schools	.66
High Schools	.34
Industrial School	.03
Bridges	.03
Turnpike and Roads	.11
T. B. Hospital	.03½
Interest	.15½
Jail Bonds	.10½
School Bonds	.20½
Tri-State Fair Bonds	.03½
Refunding Bonds	.03½
Normal School Bonds	.03½
T. B. Hospital Bonds	.03½
Total County Tax	$2.21

Receipt Valid When Check Paid

	Total Rate $2.21 on the $100	2,002.22
	Interest at 6 per cent from March 1st, 1935	
County Trustee	Penalty	
By Deputy Trustee	Total Tax	$

D 25

24

COUNTY LEVY

County Tax	$ .20
Elementary Schools	.20
High Schools	.20
Special for Roads and Bridges	.70
Special for payment of Warrants held by County	.20
Special to apply to payment of Amt. of Judgm'ts at Butler	.01
Total County	$1.70
Total State	.60
TOTAL	$1.70
Poll Tax	$2.00

PUBLIC UTILITIES

CROCKETT COUNTY TAX RECEIPT

No. 3505

W. R. CONLEY, TRUSTEE

Alamo, Tenn. Jan. 15 — 1935

RECEIVED OF Memphis Natural Gas Co

One hundred thirty five and 26/100 Dollars

ORIGINAL

1934

	$
Poll Taxes	$
State Taxes	$
County Taxes	$1 32 36
Int. and Penalty	$
Total	$1 32 36

STATE LEVY

Total State Tax $0.00

No. Acres ; Value, $

No. Lots ; Value, $

Value Personal Property, $

Total Valuation $ 7780

In full payment for Poll, State and County Taxes for the year 1934 in Dist. No. as listed above

N. J. Butler, Trustee

D. T.

D 26

22

COUNTY LEVY

General County	$0.60
General School	.20
Highway, Bridge & Road	.70
County High School	.20
Special Sch. & Bldg. Fund	.20
Special Tuberculosis Sch. & Bldg. Fund	.20
Special Sch. & Bldg. Fund	.20
Special Sch. & Bldg. Fund	.20
Health Unit	.20
Additional	.20
Total County	$3.00

ORIGINAL

TIPTON COUNTY TAX RECEIPT

No. 560

R. P. NEVIL, Trustee

Covington, Tenn. 1-18 1935

RECEIVED of Memphis Natural Gas Co 182.25

Sixteen Hundred twelve + 90/100 Dollars

1934

Poll Tax	$
County Taxes	$
State Taxes	$
Total	$ 1612 90
Int. and Penalty	$

STATE LEVY

Total State Tax $0.00

No. Acres

Value, $

No. Lots ; Value, $

Value Personal Property, $

Total Valuation $ 6550

In full payment for Poll, State, County, School, Highway and Special Taxes for the year 1934, in District No. on Poll and Property as listed above. If not in full payment, this receipt is not valid until final payment of the check.

R. P. Nevil, Trustee

D. T.

D 27

23

Office of the COMPTROLLER OF THE TREASURY

No. 2796

Nashville, Tenn. January 18, 1935

Received of Memphis Natural Gas Company

Three Hundred Fifty-six + no/100 DOLLARS

On account of Ad valorem Tax for the year 1934

$356.00

Roy C. Wallace, Comptroller

Exhibits D28-D33 To
Testimony of Birger L. Johnson

1 COUNTY LEVY

General Fund	$ .17
Insane Patients	.08
Elementary Schools	.61
High Schools	.20
Bridges & Levees	.05
Interest on Bonds	.32
Principal on Bonds	.31

1935

STATE OF TENNESSEE ORIGINAL
MADISON COUNTY
TAX RECEIPT

NO. 13209

COUNTY LEVY
Total County Tax....$1.72
State Tax ..... .80
Total State and County Tax 1935 .....$1.80
Poll Tax $2.00

NAME	ASSESSMENT				TAXES			
	NO. OF LOTS OR ACRES	VALUE LOTS	VALUE ACRES	PERSONAL	TOTAL	STATE	COUNTY	POLL	TOTAL
Memphis Natural Gas Co.,				$47,850.00		$823.19			$823.19.

INT.
PEN.
TOT.

RECEIVED PAYMENT THIS 7 DAY OF Jan 1936
TREASURER

D 28

3 COUNTY LEVY

General County	$0.50
General School	.50
Highway Bond, Int. & Sink. Fund	.77
County High School	.38
School Bond, Int. & Sink. Fund	.15
Fielding Bond, Int. & Sink. Fund	.30
Bridge Bond, Int. & Sink. Fund	.60
Health Unit	.05
Institutional	.15
Total County	$3.50

ORIGINAL **TIPTON COUNTY TAX RECEIPT** No. 466

R. P. NEVIL, Trustee
Covington, Tenn., 1-7, 1936

RECEIVED of Memphis Natural Gas
Sixteen Hundred Twelve & 90/100 Dollars

1935

Poll Tax	$
County Taxes	$ 1612 90
State Taxes	$
Total	$ 1612 90
Int. and Penalty	$

STATE LEVY
Elementary and Rural Schools .50.00
Total .50.00

No. Acres
Value, $
No. Lots
Value, $

In full payment for Poll, State, County, School, Highway and Special Taxes for the year 1935, in District No. on Personal Property as listed above. If tax is paid by check, this receipt is not valid until payment of the check.

Trustee

Bridge Tax .50
Court House Imp. Tax .10
Hard Road Tax .40
Funding Bonds .13
Refunding Bonds .02
Hospital Tax .10
High School Addition Tax .02
Total County Tax $3.50
Subscription
Grand Total $3.50

Brownsville, Tenn., Dec. 14, 1936

RECEIVED of Memphis Natural Gas Co.
Thirteen Hundred Fifteen & 11/100 DOLLARS
In full for Taxes as listed at right
Outside - 20%

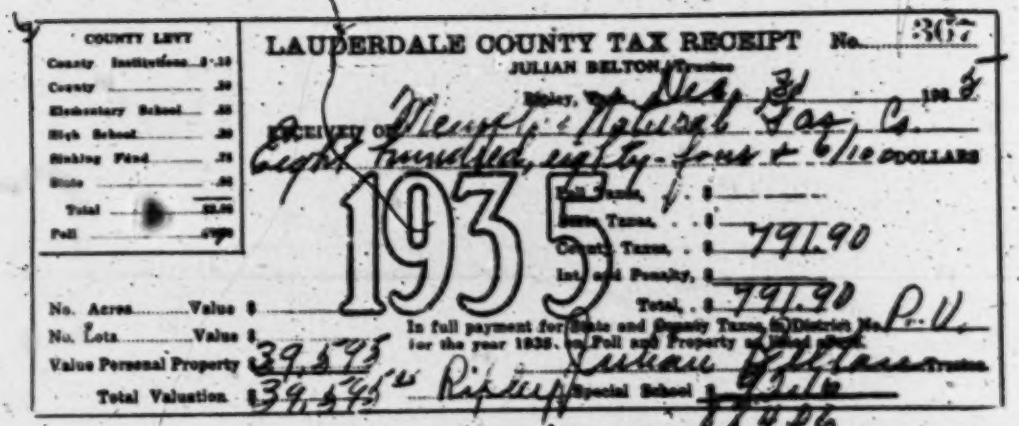
Poll Tax	$
State Taxes	$ 1315 11
County Taxes	$
Int. & Penalty	$
Total	$ 1315 11

STATE LEVY
Grand Total $2.50

Total Valuation $ 65,840
Lots Value, $
Personal Property $
Total Valuation $ 65,840

P. P. McCLANAHAN, Trustee
By Dep. Trustee.

D 30



COUNTY LEVY

County Institutions $ .10
County .30
Elementary School .40
High School .30
Sinking Fund .25
State .05
Total $1.20
Poll .75

LAUDERDALE COUNTY TAX RECEIPT No. 3067

JULIAN BELTON, Trustee

Ripley, Tenn. Dec. 31 1935

RECEIVED OF Memphis Natural Gas Co.

Eight hundred, eighty-four & 6/100 DOLLARS

1935

Poll Taxes $ ——

State Taxes $ ——

County Taxes $ 791.90

Int. and Penalty $ ——

Total $ 791.90 P.U.

No. Acres ..... Value $ ——

No. Lots ..... Value $ ——

In full payment for State and County Taxes & District No. ——

for the year 1935, on Poll and Property as listed above.

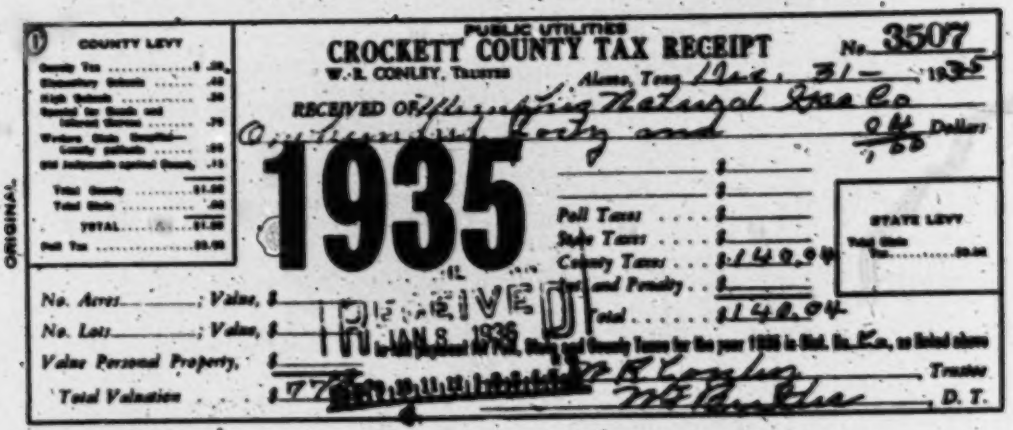
Value Personal Property 39,595

Total Valuation $ 39,595 Ripley Special School $ ——

Julian Belton Trustee

$7906

D 31



COUNTY LEVY

County Tax ..... $ .50
Elementary School ..... .40
High School ..... .30
Special Ex. Grade and Interest Taxes ..... .70
Western Grade Supplemental County Schools ..... .05
Old Judgments against County ..... .15
Total County $1.50
Total State ..... .05
TOTAL $1.55
Poll Tax $2.00

PUBLIC UTILITIES

CROCKETT COUNTY TAX RECEIPT No. 3507

W. R. CONLEY, TRUSTEE

Alamo, Tenn. Dec. 31 1935

RECEIVED OF Memphis Natural Gas Co

One hundred forty and 94/100 Dollars

1935

Poll Taxes $ ——

State Taxes $ ——

County Taxes $ 140.94

Int. and Penalty $ ——

Total $ 140.94

STATE LEVY

Total State Tax $0.05

No. Acres ..... ; Value, $ ——

No. Lots ..... ; Value, $ ——

Value Personal Property, $ ——

Total Valuation $ 7788

RECEIVED JAN 8 1936

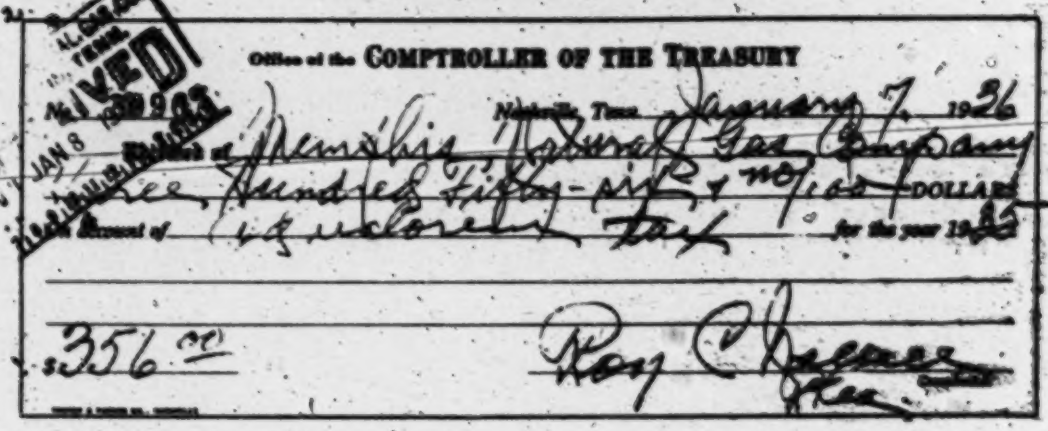
In full payment for State and County Taxes for the year 1935 in Dist. No. ——, as listed above

W R Conley Trustee

M O Burkhead D. T.

ORIGINAL

D 32



Office of the COMPTROLLER OF THE TREASURY

Nashville, Tenn. January 7, 1936

No. 1 RECEIVED JAN 9 1936

JAN 8 1936 TENN. GAS CO. MEMPHIS, TENN.

Received of Memphis Natural Gas Company

Three Hundred Fifty-six & no/100 DOLLARS

On account of Unreclaimed Tax for the year 1935

$356.00

Roy C Nelson Comptroller

D 33

Exhibits D34-D36 To
Testimony of Birger L. Johnson

D 34

ORIGINAL

COUNTY LEVY

GIBSON COUNTY TAX RECEIPT No. 1003
W. E. DUNLAP, Trustee

Trenton, Tenn. 1-30-1936

Received of Memphis National Gas Co.
Forty Three + 68/100 DOLLARS

In full payment for Poll, State, County, School and Special Taxes for the year 1935 in District No. Pub. 05, on Property and Poll.

Poll Tax	
Special School	
State Tax	
County Tax	43.68
Interest	
Total	43.68

W. E. DUNLAP, Trustee
By W E Dunlap.

$2400

$43 68

6

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	TAX	$1.34 ON $100
LEVY FOR SCHOOLS	TAX	.68 ON 100
LEVY FOR PARKS	TAX	.11 ON 100
LEVY FOR COSSITT LIBRARY	TAX	.03 ON 100
TOTAL RATE		$2.16 ON $100

R. R., T. & T. CO.'S
UTILITIES
ORIGINAL—FINAL
BILL 30
PAGE 19 LINE 6

STATE OF TENNESSEE VERSUS
MEMPHIS NATURAL GAS CO.

To City of Memphis for Taxes 1935

D 35

1935

VALUATION	6,000
FINAL QUARTERLY PAYMENT	
INTEREST	
PENALTY AND ADV.	1.93
DISCOUNT	
NET TAX	125.88

6

TAX RATE AND DISTRIBUTION

LEVY FOR GENERAL PURPOSES	TAX	$1.34 ON $100
LEVY FOR SCHOOLS	TAX	.68 ON 100
LEVY FOR PARKS	TAX	.11 ON 100
LEVY FOR COSBITT LIBRARY	TAX	.03 ON 100
TOTAL RATE		$2.13 ON $100

R. R., T. & T. CO.'S UTILITIES

ORIGINAL—FINAL

BILL 30

PAGE 19 LINE 6

STATE OF TENNESSEE VERSUS

MEMPHIS NATURAL GAS CO.

To City of Memphis for Taxes 1935

LOT	COUNTRY LOT	BLOCK		VALUATION
				6,000.

1935

FINAL OR QUARTERLY PAYMENT	
INTEREST	
PENALTY AND ADV.	1.92
DISCOUNT	
NET TAX	125.88

D 35

4. BILL 30 DIST. WARD

Shelby County, Tenn. 193

STATE OF TENNESSEE vs. MEMPHIS NATURAL GAS CO

Taxpayers are requested to examine their Tax Bills and see that no right owns all property upon which they desire to pay. The Trustee cannot look from the tax books the ownership of property, and is in no way responsible for omissions, unless taxpayers furnish description of all property upon which they wish to pay.

Page 74 Line 6

ORIGINAL—TO STATE and COUNTY TAXES FOR 1935

LOT	COUNTRY LOT	BLOCK		ACRES		
Distributable Property		34.00	Miles @ 3000		per mile	82000.00
Localized Property						138000.00
						38025.00
SUBDIVISION: R.R.T.&T.Co.'s					VALUATION	220025.00

STATE & COUNTY PAID JAN 7 1936 COUNTY TRUSTEE

Hayes Check Paid

1935

COUNTY LEVY

County Commissioners	.10
Elections	.10
Elementary Schools	.30
High Schools	.38
Industrial School	.04
Bridges	.04
Turnpikes and Roads	.04
Tuberculosis Hospital	.04
Interest	.0075
Jail Bonds	.0175
School Bonds	.0050
Tri-State Fair Bonds	.0050
Refunding Bonds	.0050
U. S. Hospital Bonds	.0050
Total County Tax	.99

	Total Rate $2.13 on the $100	1958.22
County Trustee	Interest at 6 per cent from March 1st, 1936	
By Deputy Trustee	Penalty	
	Total Tax	

D 36

[fol. 825] TABULATION OF TAX RECEIPTS (EXHIBIT D1-36 INCL.)

	1932	1933	1934	1935	Total
State Comptroller	311.20	311.20	356.00	356.00	1,334.40
Crockett	95.31	108.92	132.26	140.04	476.53
Gibson	41.40	39.12	39.12	43.68	163.32
Haywood	889.11	1,043.50	1,161.89	1,315.11	4,409.61
Lauderdale	716.66	716.66	861.02	884.06	3,178.40
Madison	607.69	734.97	823.19	823.19	2,989.04
Memphis	86.40	85.20	127.80	125.88	425.28
Shelby	1,792.79	1,792.79	2,002.22	1,958.22	7,546.02
Tipton	1,348.22	1,362.50	1,612.90	1,612.90	5,936.52
Total	5,888.78	6,194.86	7,116.40	7,259.08	26,459.12

[fol. 826] EXHIBIT E TO TESTIMONY OF BIRGER L. JOHNSON

Copy of Opinion

May 4, 1936

For some time a controversy has been pending with reference to the liability of the Memphis Natural Gas Company for excise tax under Sections 1316, et seq. of the Code of Tennessee. The entire matter reached this office when the file was referred to us for attention, with the request that we render an opinion to your Division regarding the contention of this company that its earnings in Tennessee result from interstate commerce, and, therefore, are not taxable under the statute.

You will recall that the excise tax law imposes a tax upon corporations measured by their net earnings arising from business done wholly within the State "excluding earnings arising from interstate commerce."

Under the Statute referred to, a corporation doing business in Tennessee is not required to pay excise tax upon such earnings as it derives from interstate commerce. The question does not arise as to whether the State could have included earnings from interstate commerce in the measure of the tax. Indeed, such earnings may have been included under the Constitution of the United States in the measure of the tax of domestic corporations or of foreign corporations doing an intrastate business. However, since our statute explicitly excludes earnings arising from interstate commerce, the only inquiry is whether the earnings of the Memphis Natural Gas Company in this State result from interstate commerce.

According to the facts as revealed by the file, this company is engaged in transporting natural gas from the company's fields in Louisiana into the State of Tennessee, such transportation being made by means of a trunk line of pipe. The Memphis Natural Gas Company is not engaged in any manner in the distribution of natural gas to individual customers but it transports natural gas through its pipe lines to a point in Tennessee at which the main line is tapped by the Memphis Power and Light Company, which distributes it to customers in Memphis. The question which we are considering is not the liability of the Memphis Power and Light Company for excise tax but the liability of the Memphis Natural Gas Company.

The gas withdrawn by the Memphis Power and Light Company from the pipe lines of the Memphis Natural Gas Company is measured by a thermometer and a meter furnished by the Memphis Natural Gas Company.

The Memphis Natural Gas Company also sells and delivers from its main trunk pipe line natural gas to the West Tennessee Power and Light Company at various towns in West Tennessee to which the West Tennessee Power and Light Company distributes gas. When the gas flows out of the pipe line of the Memphis Natural Gas Company into the pipe line of the distributing companies it becomes the property of the distributing companies.

Under the facts stated, the Memphis Natural Gas Company is engaged in interstate commerce. Its earnings in Tennessee result from interstate commerce and it enjoys no earnings in Tennessee except those resulting from interstate commerce. A review of all the decisions which are in point would be of no benefit. See case of State Tax Commission of Mississippi v. Interstate Natural Gas Company, 284, U. S., 41, 76 L. ed., 156.

[fol. 827] You are, therefore, advised that the Memphis Natural Gas Company is not subject to the excise tax law if its method of doing business is that revealed by the file, which is the method outlined above.

Yours very truly, Edwin F. Hunt (Signed), Assistant Attorney-General.

EFH:AY.

[fol. 828] EXHIBIT F TO TESTIMONY OF BIRGER L. JOHNSON

Form Et-150. No. 121077.

Excise Tax Bill and Notice

Corporations and Joint Stock Associations

Year 1935. Date 10/10/35.

Article XII, Code of Tennessee, 1932

Memphis Natural Gas Co., 46 Cedar Street, New York, N. Y.

Tax	$1025.18
Credit Allowed	$ 150.00
Payable July 1, 1935	$ 875.18
Interest	$
Penalty	$
Total Due	$ 875.18

Above amount is excise tax levied under Article XII, Code of Tennessee, 1932.

This tax becomes delinquent if not paid on or before July 1, 1935. Penalty of 1% per month and interest at the rate of 6% per annum will attach if delinquent 30 days. Interest and penalty are mandatory and will become a part of the tax after August 1st of each year.

Make Check Payable to State Comptroller

Mail Check to Excise and Income Tax Unit, 107 Memorial Bldg., Nashville, Tenn.

Dancy Fort, Commissioner. Commissioner of Finance and Taxation.

Corporation Excise Tax Due and Paid

Memphis Natural Gas Co., New York, N. Y.

Checked by J. A. S.

Tax	$ 875.18
Interest	
Penalty	
Total	$ 875.18

No. 121077.
Date 10/10/35.

[fol. 829] EXHIBIT G TO TESTIMONY OF BIRGER L. JOHNSON

Office of Wm. J. Bacon, Sheriff

——Court No.——

State of Tennessee

vs.

Memphis Natural Gas Company

Mr. Memphis Natural Gas Co., Sterick Bldg., City.

Memphis, Tenn., January 20, 1936.

Distress Warrant in the above styled cause has been placed in my hands for collection. If you will call and settle same promptly you will be saved further costs and embarrassment.

Excise Tax	$953.95
Interest	$
Court Cost	$
Sheriff's Commission	$ 23.10
Total	$977.05

Wm. J. Bacon, Sheriff, by G. S. Finley (Signed), Deputy Sheriff.

Tax for year 1935.

This Is Final Notice

Civil Dept., Room 314, Court House, Phone 6-7050

[fol. 830] EXHIBIT H1 TO TESTIMONY OF BIRGER L. JOHNSON

Lewis S. Pope

Lawyer and Investigator

For the State of Tennessee

513-514 National Bank Bldg.

Nashville, Tenn.

April 23rd, 1938.

Memphis Natural Gas Co.,
Memphis, Tennessee.

GENTLEMEN:

Enclosed you will find bill and notice covering your delinquent excise tax due the State of Tennessee for three years, that which was due on July 1, 1933, 1934 and 1935; this developed from the investigation which I am conducting.

We have not sufficient information before us at this time to determine the amount due for the years July 1, 1936 and July 1, 1937.

It may be that you should be entitled to some credits on the years figured, as shown by the enclosed bill and notice, depending, of course, upon the allocation of your net earnings on business done in Tennessee. If you are entitled to any credits, we will be glad to allow them upon proper showing being made.

Please let me hear from you relative to this matter.

Very truly, Lewis S. Pope (Signed), Lawyer and Investigator.

LSP:H.

[fol. 831] EXHIBIT H2 TO TESTIMONY OF BIRGER L. JOHNSON

Lewis S. Pope

Lawyer and Investigator

For the State of Tennessee

513-514 National Bank Building

Nashville, Tenn.

State of Tennessee Excise Tax Bill and Notice

Sec. 1316 et seq. Code of Tennessee—1932

Memphis Natural Gas Co.,
Memphis, Tennessee.

Tax (1932 Earnings)	$12,643.69
Credit (Filing Fee)	150.00
Net Tax (due July 1, 1933)	12,493.69
Penalty (1% per mo. 57 mos.)	7,121.40
Interest (6% per annum)	3,604.43
Tax (1933 earnings)	11,329.84
Credit (filing fee)	150.00
Net Tax (due July 1, 1934)	11,179.84
Penalty (1% per mo. 45 mos.)	5,031.00
Interest (6% per annum)	2,588.87
	18,799.71

Tax (1934 earnings)	10,251.79	
Credit (filing fee)	150.00	
Net Tax (due July 1, 1935)	10,101.79	
Penalty (1% per mo. 33 mos.)	3,333.66	
Interest (6% per annum)	1,702.15	
	15,137.60	
Total		$57,156.83

Lewis S. Pope (Signed), Lawyer and Investigator for the State of Tennessee.

April 22, 1938.

[fol. 832] EXHIBIT I TO TESTIMONY OF BIRGER L. JOHNSON

Lewis S. Pope

Lawyer and Investigator

For the State of Tennessee

513-514 Third National Bank Bldg.

Nashville, Tenn.

State of Tennessee Excise Tax Bill and Notice

Sec. 1316 et seq. Code of Tennessee—1932

June 9, 1938.

Memphis Natural Gas Co.,
931 Sterick Building,
Memphis, Tennessee.

Tax (1932 Income)	$10,008.30	
Filing Fee (credit)	150.00	
Tax due July 1, 1933	9,858.30	
Penalty—to June 1, 1938	5,816.39	
Interest—to 6-1-38	2,908.20	
Total	18,582.89	

Tax (1933 Income)	9,450.91	
Filing Fee (credit)	150.00	
Tax due 7-1-34	9,300.91	
Penalty—to 6-1-38	4,371.45	
Interest—to 6-1-38	2,185.71	
Total	15,858.05	
Tax (1934 income)	7,090.56	
Filing Fee (credit)	150.00	
Tax due—7-1-35	6,940.56	
Penalty to 6-1-38	2,429.00	
Interest to 6-1-38	1,214.50	
Total	10,584.06	
Tax (1935 Income)	6,956.18	
Filing Fee (credit)	150.00	
Tax due—7-1-36	6,806.18	
Penalty to 6-1-38	1,565.42	
Interest to 6-1-38	782.71	
Total	9,154.31	
Grand Total		$54,17[illegible]31

Lewis S. Pope (Signed), Lawyer and Investigator for the State of Tennessee.

[fol. 833] EXHIBIT J TO TESTIMONY OF BIRGER L. JOHNSON

Lewis S. Pope
Lawyer and Investigator for the State of Tennessee
513-514 Third National Bank Bldg.,
Nashville, Tennessee

April 29th, 1938.

Armstrong McCadden Allen Braden & Goodman, Attorneys-at-Law, Commerce Title Building, Memphis, Tennessee:

DEAR SIRS:

In matter of tax liability Memphis Natural Gas Company

This office was aware of the existence of the opinion of May 4, 1936 when Bills and Notices for corporation excise tax for the years 1933, 1934 and 1935 were mailed.

It is also aware that Memphis Natural Gas Company makes no report to Railroad and Public Utility Commission. The Commissioner of Finance and Taxation held in 1936, that opinion of May 4, 1936 was highly persuasive but not conclusive, and insofar as we have been advised the tax liability stands.

We enclose herewith an opinion by General Beeler, dated April 21, 1938, and to dispose of item we will ask for a distress warrant on May 4.

Respectfully, (Signed) Lewis S. Pope, Lawyer and Investigator for the State of Tennessee.

[fol. 834] EXHIBIT K TO TESTIMONY OF BIRGER L. JOHNSON

State of Tennessee

Department of Finance and Taxation

Nashville

Walter Stokes, Jr., Commissioner.

War Memorial Building

July 17, 1938.

Memphis Natural Gas Company, Memphis, Tennessee.

GENTLEMEN:

Re: Excise Tax 1932-35, Inclusive. Special Investigation

This is to advise you that in compliance with the request of Honorable Lewis S. Pope, Special Investigator, and in keeping with the Attorney General's opinion of June 16, 1938, it will become my duty to issue distress warrant covering the above delinquent taxes, together with interest and penalty, if payment is not received by June 22.

While the above relates particularly to the delinquency in the hands of the Special Investigator, I am causing statement to be rendered you covering the 1936 tax, which, under the opinion rendered, is due and payable.

Yours very truly, (Signed) Walter Stokes, Jr., Commissioner.

WS:h.

cc: Armstrong, McCadden, Allen, Braden & Goodman, Memphis, Tenn. Collection Division.

Received June 18, 1938. Memphis Natural Gas Company.

[fol. 835] EXHIBIT L TO TESTIMONY OF BIRGER L. JOHNSON

Statement of Management Fees Paid by Memphis Natural Gas Company During Years 1932-1935 Inclusive

Year	Amount
1932	$46,855.25
1933	44,848.31
1934	47,341.00
1935	53,602.65
Total	$192,647.21

[fol. 836] EXHIBIT M TO TESTIMONY OF BIRGER L. JOHNSON

Statement of Net Earnings of Memphis Natural Gas Company Derived from Interstate Business Which is Allocated to State of Tennessee

Year	Amount
1932	$305,381.04
1933	281,644.79
1934	184,583.13
1935	169,851.28
Total	$941,460.24

[fol. 837] IN SUPREME COURT OF THE UNITED STATES

Statement of Points to be Relied upon and Designation of Parts of Record to be Printed—Filed August 14, 1941

STATEMENT OF POINTS APPELLANT INTENDS TO RELY UPON

Comes now the Memphis Natural Gas Company, appellant in the above cause, conforming to Rule 13 (6) of this Honorable Court, and states that it intends to rely in this appeal upon the following points:

I

Sections 1316, 1317 and 1318 of the official Tennessee Code of 1932, which sections are set out verbatim in appellant's jurisdictional statement and in its assignments of error, as construed and applied by the Supreme Court of Tennessee are invalid and unconstitutional in that, as so construed and applied, they impoose upon the interstate transportation and sale of natural gas by appellant a tax burden and

amount to an interference with and obstruction of and an attempted regulation of interstate commerce in violation [fol. 837a] of Article 1, Section 8, Clause 3, of the Constitution of the United States.

II

In construing and applying Sections 1316-1318 of the official Code of 1932 so as to exact an excise tax from the earnings of the appellant derived exclusively from the sale and transportation of natural gas, the Supreme Court of Tennessee deprived appellant of a right, privilege and immunity specially set up and claimed by it under the Constitution of the United States, which right, privilege and immunity was claimed under Article 1, Section 8, Clause 3 of the Constitution of the United States, the effect of which is to exempt interstate commerce from interference by a state by the imposition of a tax and direct and discriminatory burden on same.

III

Appellant will insist that the holding of the Supreme Court of Tennessee that there was a joint enterprise between the Memphis Natural Gas Company and the Memphis Power & Light Company was erroneous and that the facts in the case disclose that there was no joint enterprise between appellant and the Memphis Power & Light Company, and appellant will further insist that the relationship of the parties was not such as deprived the business of appellant in connection with the sale and transportation of natural gas of its interstate character or permitted the imposition of a direct tax burden on same, and that the imposition of said excise tax under the facts of the case, is in violation of Section 1, Article 8, Clause 3 of the Constitution of the United States.

[fol. 837b] Designation of Parts of Record Considered by Appellant Unnecessary to be Printed

Appellant considers it unnecessary to print the following parts of the transcript of the record:

1. Cost and Injunction Bond. (Typescript Record, p. 39.)

2. Subpoena to Answer and Sheriff's Return. (T. R. pp. 44, 45.)

3. Order Allowing Amendment and Reducing Bond. (T. R. p. 50.)

4. Sheriff's Return. (T. R. p. 53.)

5. Affidavit in Support of Motion to Require Production of Contract. (T. R. p. 58.)

6. Order denying Motion for Production of Contract. (T. R. p. 60.)

7. Formal stipulation and appearances on depositions. (T. R. p. 78.)

8. Formal caption and appearance in connection with Binswanger's deposition. (T. R. p. 272.)

9. Formal caption and appearances in connection with deposition of F. French Bradley. (T. R. p. 361.)

10. Deposition of F. O. Bearman and all exhibits thereto. (T. R. pp. 423-517, incl.)

[fol. 837c] 11. Deposition of Julian J. Thomas and all exhibits thereto. (T. R. pp. 518-531, incl.)

12. Deposition of J. W. Jakes. (T. R. pp. 531-540, incl.)

13. Stipulation of Parties and all exhibits thereto. (T. R. pp. 549-617, incl.)

14. Stipulation of parties and all exhibits thereto. (T. R. pp. 618-620, incl.)

15. Order Overruling Objections to Evidence. (T. R. p. 635.)

16. Cost Bill. (T. R. p. 637.)

17. Order Allowing Additional Time for Filing Petition to Rehear. (T. R. p. 682.)

18. Stay Order. (T. R. p. 701-a.)

19. Citation. (T. R. p. 701-f.)

20. Supersedeas Bond. (T. R. p. 701-g.)

21. Certificate of Clerk and of Chief Justice Green. (T. R. 701-j.)

22. Ad valorem tax receipts. (T. R. pp. 818-824, incl.)

23. The opinions of the Justices of the Supreme Court of Tennessee appear twice in the record—once in the record proper and once in the jurisdictional statement. Omission of one copy of these opinions in printing, with proper references, is suggested.

Memphis Natural Gas Company; by Walter P. Armstrong, Attorney.

[fol. 837d] ACCEPTANCE OF SERVICE OF STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Received a copy of appellant, Memphis Natural Gas Company's Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed, and accepted service of same this the 12 day of August, 1941.

Roy H. Beeler, Attorney General, State of Tennessee; George F. McCanless, Commissioner of Finance and Taxation, by Roy H. Beeler, Attorney General.

[fol. 837e] ACCEPTANCE OF SERVICE OF STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Received a copy of appellant, Memphis Natural Gas Company's Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed, and accepted service of same this the 12th day of August, 1941.

Lewis S. Pope, Lawyer and Investigator.

[fol. 837f] [File endorsement omitted.]

[fol. 838] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD CONSIDERED BY APPELLEES AS NECESSARY TO BE PRINTED AND WHICH WERE OMITTED BY APPELLANT IN ITS DESIGNATION—Filed August 14, 1941

Appellees, under Rule 13 (9), consider it necessary to print the following parts of the transcript of the record which were omitted in the designation of the appellant.

1. Deposition of F. O. Bearman and all exhibits thereto. Omitting formal caption and stipulation relative thereto. (T. R. Page 423-517 incl.)

2. Deposition of Julian J. Thomas—Omitting all exhibits, formal caption and stipulation. (T. R. pages 518-524 incl.)

3. Deposition of J. W. Jakes—Omitting formal caption and stipulation relative thereto. (T. R. pages 531-540 incl.)

4. Stipulation of parties and all exhibits thereto. (T. R. pages 549-617 incl.)

5. Order over-ruling objection to evidence. (T. R. page 635.)

6. Advalorem Tax Receipts. (T. R. pages 818-824 incl.)

Lewis S. Pope, et al., by Lewis S. Pope, Atty. for Appellee.

[fol. 839] ACCEPTANCE OF SERVICE OF ADDITIONAL DESIGNATION BY APPELLEES OF PARTS OF THE RECORD TO BE PRINTED

Received a copy of appellees', Lewis S. Pope, et.al. designation of parts of record to be printed and which were omitted by appellant and accepted service of the same.

This 14th day of August 1941.

Memphis Natural Gas Company, by Walter P. Armstrong, Attorney.

[fol. 840] [File endorsement omitted.]

Endorsed on Cover: File No. 45,827. Tennessee Supreme Court. Term No. 499. Memphis Natural Gas Company, Appellant, vs. Roy H. Beeler, Attorney General of the State of Tennessee, et al. Filed August 9, 1941. Term No. 499, O. T., 1941.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 9 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 499

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT AS TO JURISDICTION.

WALTER P. ARMSTRONG,
T. A. MCEACHEM, JR.,
Counsel for Appellant.

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STATUTES CITED.

Constitution of the United States, Article I, Sec. 8, Clause 3 ..... 3, 7, 10, 11, 12
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IN THE SUPREME COURT OF TENNESSEE

MEMPHIS NATURAL GAS COMPANY,

vs.

LEWIS S. POPE, ET AL.

JURISDICTIONAL STATEMENT REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

A.

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States in this case are Sections 237 and 237-A of the Judicial Code as amended by the Act of February 13, 1925, and the Act of January 31, 1928, as amended by the Act of April 26, 1928.

In the Supreme Court of Tennessee there was drawn in question the validity of statutes of the State of Tennessee, as construed and applied, on the ground of their being repugnant to the Constitution of the United States and the decision of the Supreme Court of Tennessee was in favor of the validity of said statutes.

B.

The statutes of the State of Tennessee, the validity of which is involved, are Sections 1316-1318 of the Official Code of Tennessee of 1932, and are as follows:

"Sec. 1316.—*Tax imposed.*—All corporations and joint stock associations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations and joint stock associations organized under the laws of any other state or county for profit and doing business in Tennessee, shall, without exception, pay to the state comptroller annually an excise tax, in addition to all other taxes, equal to three per cent. of the net earnings for their preceding fiscal year of such corporations and joint stock associations, arising from business done wholly within the state, excluding earnings arising from interstate commerce. Tennessee insurance companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state."

"Sec. 1317. *Credit for certain other taxes paid.*—Any corporation or joint stock association, paying the tax imposed, shall be entitled to a credit upon the tax imposed for the amount paid, in the preceding twelve months prior to July 1st of the year in which this tax becomes due, to the secretary of state under the terms of section 4136; insurance companies shall be entitled to a credit for all amounts so paid during the preceding twelve months under section 6 of the general revenue bill, and also under section 5716, and corporations or joint stock associations engaged in mercantile pursuits, and paying the merchants' privilege tax to the State of Tennessee shall be entitled to a credit for the amount so paid during such preceding twelve months; and all other corporations and joint stock associations shall be entitled to a credit upon the tax herein imposed for any amount paid to the state for such preceding twelve months under any general revenue bill, as a privilege tax, unless otherwise expressly provided in the statute imposing the priv-

ilege tax; provided, that the tax herein imposed is a state tax levied for state purposes only, and no county or municipality or taxing district shall have power to levy any like tax."

"Sec. 1318. *Due, when; penalty.*—The tax imposed shall be due and payable on July 1st of each succeeding year; and, if delinquent thirty days, shall be subject to a penalty of one per cent. per month, and, in addition, interest at the rate of six per cent. per annum from July 1st until paid."

The Memphis Natural Gas Company in the Supreme Court of Tennessee challenged the validity of these statutes on the ground that as construed and applied so as to impose an excise tax upon the net earnings of the Memphis Natural Gas Company derived from the transportation and sale by means of a pipe line of natural gas from the State of Louisiana to the State of Tennessee in continuous flow, they were violative of the interstate commerce clause of the Constitution of the United States, Article 1, Section 8, Clause 3 of that Constitution, in that they imposed a license or a privilege tax on interstate commerce, placed a burden on the privilege of carrying on interstate commerce, constituted an interference with, and obstruction of, and an attempted regulation of, interstate commerce and were a usurpation of the powers delegated to the Congress of the United States by said provision of the Constitution of the United States.

The Supreme Court of Tennessee, which is the court of last resort of that State, held that notwithstanding the fact that said statutes, as construed and applied, imposed an excise tax upon the earnings thus derived by appellant solely from interstate commerce, they were constitutional and not violative of Article 1, Section 8, Clause 3 of the Constitution of the United States, thus denying the Federal right and claim asserted by appellant under the Constitution of the United States.

C.

The judgment and decree sought to be appealed from was first rendered on May 17, 1941, by the Supreme Court of Tennessee. This decree was modified and corrected on May 27th, 1941. On June 7th, 1941, Memphis Natural Gas Company, appellant, filed in this cause in the Supreme Court of Tennessee a petition to rehear and reverse said decree and judgment. This petition to rehear was denied on June 28, 1941. The application for appeal is presented July 23, 1941.

D.

This cause was instituted by the filing in the Chancery Court of Davidson County, Tennessee of an original bill by the Memphis Natural Gas Company against Lewis S. Pope, Lawyer and Investigator, Walter Stokes (for whom was substituted by consent court order, George E. McCanless, his successor in office) Commissioner of Finance and Taxation of the State of Tennessee, and Roy H. Beeler, Attorney General of the State of Tennessee, the persons charged with the collection of the excise tax imposed by Sections 1316-1318 of the Official Code of Tennessee of 1932, hereinabove set out in full, seeking a permanent injunction against their seeking to collect from Memphis Natural Gas Company any excise tax on account of the net earnings of said Memphis Natural Gas Company derived from the sale of natural gas in interstate commerce, which natural gas was transported by Memphis Natural Gas Company, through pipe lines, from Louisiana to Tennessee, where it flowed into the pipe lines of the purchasers.

The original bill claimed that if such statutes were construed and applied to impose said tax upon these earnings of the Memphis Natural Gas Company, they violated ap-

pellant's right under the Constitution of the United States, and alleged in part as follows:

> "THE CONSTRUCTION OR APPLICATION OF SECTIONS 1316 TO 1318 OF THE TENNESSEE CODE OF 1932 SO AS TO EXACT FROM COMPLAINANT THE EXCISE TAX PROVIDED FOR BY THESE SECTIONS WOULD 'CONSTITUTE A VIOLATION OF COMPLAINANT'S RIGHTS AS GUARANTEED TO COMPLAINANT UNDER ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES, IN THAT
>
> (a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.
>
> (b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.
>
> (c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.
>
> (d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.'"

The original bill alleged, and the proof showed, that Memphis Natural Gas Company was the owner and operator of an interstate gas pipe line extending from the gas fields near Monroe, Louisiana, through the States of Arkansas and Misssissippi and into Tennessee. Appellant purchased natural gas in Louisiana and through this pipe line transported it to Tennessee, where it flowed into the pipe line of the two purchasers, public utility companies, Memphis Power & Light Company and West Tennessee Power & Light Company, contracts for purchase of said gas having been entered into in the State of New York. The gas was withdrawn from appellant's pipe line and moved

in a continuous flow in to the distributing pipe lines of the two purchasing companies. At the time of the withdrawal and for the purpose of, and necessarily incident to, delivery of the natural gas, appellant measured the gas by meters and its pressure was reduced in order to make delivery practicable. Appellant did not own or operate any distribution facilities, any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Nothing was extracted from it, and no other gas mixed with it.

Appellant neither owned nor operated any instrumentality which was, or could be, used in the local distribution of natural gas in the State of Tennessee and had no ownership or control of the natural gas delivered to the purchasing companies after it passed into their pipe lines.

The relationship between appellant and the purchasing companies was solely that of buyer and seller, the contract with the purchasing company, Memphis Power & Light Company, having in it a formula for the adjustment of prices to be paid in the future for gas, dependent upon future conditions. The excise taxes, collection of which was sought to be enjoined, were imposed entirely upon earnings of appellant derived exclusively from this interstate business. "Temporary injunction was issued and supersedeas denied by Chief Justice Green of the Supreme Court of Tennessee. Copy of the memorandum opinion of Chief Justice Green denying supersedeas is attached hereto." The Chancellor of the Chancery Court of Davidson County on final hearing held that Sections 1316-1318 of the Official Tennessee Code of 1932 did not operate to impose the excise tax upon these earnings of appellant, because the earnings did not arise from business done wholly within the State, but from interstate commerce. A copy of the opinion of the Chancellor is attached hereto.

The defendants in the Chancery Court appealed to the Supreme Court of Tennessee. In that court appellant in

its brief again asserted that if said statutes were construed so as to impose this excise tax upon earnings derived from business done as above set out, it was unconstitutional and in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, one of the headings of appellant's brief in the Supreme Court of Tennessee being:

> "THE CONSTRUCTION OR APPLICATION OF SECTIONS 1316 TO 1318 OF THE TENNESSEE CODE OF 1932 SO AS TO EXACT FROM COMPLAINANT THE EXCISE TAX PROVIDED FOR BY THESE SECTIONS WOULD 'CONSTITUTE A VIOLATION OF COMPLAINANT'S RIGHTS AS GUARANTEED TO COMPLAINANT UNDER ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES IN THAT
>
> (a) Said proceedings and actions attempt to impose a license or privilege tax on interstate commerce.
>
> (b) Said proceedings and actions attempt to place a burden on the privilege of carrying on interstate commerce.
>
> (c) Said proceedings and actions constitute an interference with and obstruction of and an attempted regulation of interstate commerce.
>
> (d) Said actions and proceedings are an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.'"

Said brief was further and in part as follows:

> "Our insistence now, however, is that any other construction or application of the statute would be a violation of complainant's constitutional rights and in conflict with Article 1, Section 8, Clause 3, of the Constitution of the United States, which confers upon Congress the power to regulate interstate commerce. Therefore, we here and now make that federal question, and it is our submission that any other construction or applica-

tion of the statute to the transactions here involved different from that made by the Chancellor would immediately bring the statute as so construed and applied in conflict with the commerce clause of the Federal Constitution.

In this connection we point out that the cases which we have already cited and quoted from not only hold that similar transactions there involved were interstate commerce, but were interstate commerce of such nature as to be immune to the tax there involved under Article 1, Section 8, Clause 3, of the Constitution of the United States.

Therefore, again we cite these cases in support of our contention that not only are complainant's earnings exempt from the excise tax provided for by sections 1316 and 1318, Tennessee Code of 1932, but that they are protected from any such tax by that provision of the Federal Constitution.

Our insistence is that not only has the state expressly refrained from taxing interstate commerce, but that it does not possess the power to impose a tax upon the business in which the complainant was engaged in the years 1932 to 1935, and that if either this statute or any other statute had taxed the business of complainant during those years, as is now attempted to tax it, such a statute and its application would have been unconstitutional.

State Tax Commission *v.* Interstate Natural Gas Company, 284 U. S. 41, 76 L. ed. 156, Paper Book p. 2;

Pennsylvania *v.* West Virginia, 262 U. S. 553, 67 L. ed. 1117 (1923);

Missouri, ex rel., Barrett *v.* Kansas Natural Gas Company, 265 U. S. 298, 68 L. ed. 1027 (1924), Paper Book p. 10;

Public Utilities Commission *v.* Landon, 249 U. S. 236, 63 L. ed. 577 (1919);

Eureka Pipe Line Company *v.* Hallanan, 257 U. S. 265, 66 L. ed. 227 (1921), Paper Book p. 13;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 75 L. ed. 1171 (1931), Paper Book p. 19.

> But we do not elaborate upon this argument because of the full quotations already made from the cases and because we believe we are clearly entitled to prevail under the express terms of the Tennessee statute. But, we earnestly make the insistence because we want it distinctly to appear that this right so claimed under the Federal Constitution is strongly insisted upon."

The Supreme Court of Tennessee reversed the Chancery Court of Davidson County and construed Sections 1316-1318 of the Official Tennessee Code of 1932 as imposing an excise tax upon the earnings of appellant derived wholly from the sale and transportation of gas as above set out, and held that the Acts so construed did not violate Article 1, Section 8, Clause 3, of the Constitution of the United States. The majority opinion of the Supreme Court of Tennessee, delivered by Mr. Justice Fancher, a special judge, was filed May 17, 1941, and a copy of this opinion is attached hereto. Judgment in accordance with this opinion was rendered on the same date.

In the majority opinion the Court said:

> "We are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to customers by distribution or upon orders on demand, considering all its activities, it is intrastate business. This is true though the gas so furnished is drawn from interstate mains."

A concurring opinion was filed by Mr. Justice McKinney and a copy of this opinion is attached hereto. In this opinion, Mr. Justice McKinney said:

> "I concur in the conclusion announced in the majority opinion upon the ground that the involved tax can be sustained under the principles announced in Southern

Nat. Gas Corp. *v.* Alabama, 301 U. S. 148, 81 L. ed. 970, and Atlantic L. Co. *v.* Com'r of Corp. and Taxn., 298 U. S. 553, 80 L. ed. 1328. In those cases the court, in distinguishing them from that of Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555, 69 L. ed. 439, emphasized the fact that oil was neither received nor delivered in Missouri, and indicated that had it been so received or delivered the result would have been different; and, as I interpret the opinion in the Alabama Case, it makes no difference whether the delivery is to the consumer or distributor or to both.

"• • • This gas is delivered in greatly reduced pressure from that in which it is piped into Memphis, and complainant operates pressure control stations in Shelby County, Tennessee, for that purpose. This gas flows into Memphis in an 18-inch pipe where it is broken up and distributed in pipes varying in diameter from 10 inches to 3 inches. This, under my interpretation of the decisions of the Supreme Court of the United States is, so to speak, 'a breaking of the original package,' which, in connection with the other activities of complainant in Memphis and other sections of West Tennessee, constitutes 'engaging in business in the state' so as to subject it to the tax."

A dissenting opinion was filed by Mr. Justice Chambliss, and a copy of that opinion is attached hereto.

On June 7, 1941, appellant filed a petition to rehear, in which it was asserted that the statute as construed and applied by the Supreme Court of Tennessee, was violative of Article 1, Section 8, Clause 3, of the Constitution of the United States. Said petition to rehear quoted from appellant's brief that part hereinabove quoted.

This petition to rehear was overruled by the Court on June 28, 1941, in an opinion of Mr. Justice Fancher. Copy of this opinion is attached hereto. In the opinion Mr. Justice Fancher said:

"The claim of constitutional right under Art. 1, Sec. 8, Clause 3, of the Federal Constitution was pre-

sented in the original bill of complainant and in briefs and argument. In refusing to sustain the bill and in holding that the business of complainant, furnishing gas in a joint undertaking with the distributing corporation, and in its business relationship as a whole was intrastate, obviously the claim of federally protected right was decided adversely to complainant."

E.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

The validity of a State statute is drawn in question under Section 237 of the Judicial Code, as amended, when it is claimed that as construed and applied by the court of last resort of the State, it violates the commerce clause of the Constitution of the United States, being Article 1, Section 8, Clause 3, of said Constitution.

Merchants National Bank of Richmond v. *City of Richmond*, 256 U. S. 635;

Eureka Pipe Line Company v. *Hallanan*, 257 U. S. 265;

United Fuel Gas Company v. *Hallanan*, 257 U. S. 277;

Dahnke-Walker Milling Company v. *Bondurant*, 257 U. S. 282.

F.

The questions involved in this appeal are substantially within the rule of *Zucht* v. *King*, 260 U. S. 174. The Supreme Court of the United States has repeatedly held that transportation of natural gas under circumstances similar to those here involved is interstate commerce, and that a tax cannot be constitutionally imposed upon the same by State statutes.

State Tax Commission of Mississippi v. *Interstate Natural Gas Co.*, 284 U. S. 41, 76 L. ed. 156 (1931);

Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265, 66 L. ed. 227 (1921);

Public Utilities Commission of Kansas v. *Landon*, 249 U. S. 236, 63 L. ed. 577 (1919);

Missouri, ex rel. Barrett v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027 (1924);

East Ohio Gas Co. v. *Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171 (1931);

Ozark Pipe Line Corp. v. *Monier*, 266 U. S. 555, 69 L. ed. 439 (1925).

Under the rule of these cases, Memphis Natural Gas Company's transportation of gas was not subject to the excise tax and when the Supreme Court of Tennessee construed and applied Sections 1316-1318 of the Official Code of Tennessee of 1932 so as to impose a tax upon this sale and transportation of natural gas, the Act was then violative of Article 1, Section 8, Clause 3, of the Constitution of the United States.

WALTER P. ARMSTRONG,
T. A. MCEACHEM, JR.,
Solicitors for Memphis Natural Gas Company.

EXHIBIT "A".

Opinion of Chancellor R. B. C. Howell, Chancellor, Chancery Court of Davidson County, Tennessee.

IN CHANCERY—Part One.

Rule No. 53369

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

The record in this cause presents a mixed question of law and fact growing out of the claim by the defendants, officials of the State, that the complainant is liable for an assessment for excise taxes for the years 1932 to 1935 inclusive, amounting to about $60,000.00.

It is the contention of the complainant that it is engaged solely and exclusively in interstate commerce and that all of its earnings during the years in question arose entirely from interstate business, which is especially excluded from the provisions of the excise tax law, while the defendants claim that the business done by the complainant, or at least a part thereof, is intrastate commerce, and therefore the complainant is liable for excise taxes for the years in question.

There is very little if any, conflict in the testimony as to the actual business transacted by the complainant, the controversy in this regard being whether or not that business so conducted is interstate or intrastate commerce.

The Court finds the facts to be:

The complainant is the owner and operator of a gas pipe line extending from the gas fields near Monroe, Louisiana, through the states of Arkansas, Mississippi and into the State of Tennessee, near Memphis, the gas transported by it being purchased under a contract from the United Gas Pipe Line Company and the delivery of the gas to it is made at a station near Monroe, Louisiana. This gas is transported into pipe lines through the states of Louisiana, Ar-

kansas, Mississippi and into Tennessee, and, at points along said line outside the State of Tennessee, delivery is made to certain customers which are public utility distributing companies, and in Tennessee is delivered to two purchasers, public utility distributing companies, one the Memphis Power & Light Company at Memphis, Tennessee, and the other the West Tennessee Power & Light Company, outside of Shelby County, Tennessee. The contracts for the purchase of gas by these two companies were entered into in the State of New York. Delivery of gas in the State of Tennessee is made at a station called The City Gate Meter Station, at which place the gas is withdrawn from the pipe line of complainant and moves in a continuous flow out of said pipe line and into the distributing pipe lines of the two public utility distributing company customers, who in turn serve many local consumers.

Part of the gas delivered to the Memphis Power & Light Company in the City Gate Meter Station, is transported by it through its own pipe line to its electric generating stations where it is consumed in the operation of a generating plant by said company, and the remainder is sold by it to local customers.

The complainant does not own or operate any tanks, reservoirs or equipment used for the storage of gas in Tennessee. Said gas does not come to rest in the State of Tennessee, but passes in a continuous flow into the pipe lines of complainant's two Tennessee customers.

The complainant company does not operate or maintain any equipment of any kind used in the distribution of gas in Tennessee, nor does it have any ownership or control of said gas after it is delivered, as above stated, into the distributing lines of the public utility distributing companies.

The complainant sells gas under contracts with the two public utility distributing companies in Tennessee, and its relation with them is that of buyer and seller, and such has been its relation during the years in question here.

The complainant maintains an office in Memphis, Tennessee, and the business transacted at this office during the years in question was exclusively the operation and management of the company's pipe line referred to. The Court

therefore finds that under these circumstances the business conducted by the complainant company is wholly interstate commerce and therefore exempted by the express provisions of Section 1316 of the Tennessee Code which excludes earnings arising from interstate commerce.

It is contended by the defendants that the contract between the complainant and the public utility distributing companies constitutes them partners in business and that for this reason the complainant is engaged in intrastate business.

From a careful examination of the contract in question the Court is satisfied that these public utility companies are the buyers of gas from the complainant company, and that the arrangements made as to the price to be paid for the gas delivered does not change or affect the nature of the complainant's operations in the State of Tennessee.

It is insisted by the defendants that because the complainant filed its charter with the Secretary of State that this is an admission that it is engaged in intrastate business. This does not necessarily follow. Many corporations have charters filed in the State of Tennessee under which they may be authorized to engage in a certain character of business, but do not do so, and the tax in this case is based upon the business *done* in the State of Tennessee as a matter of fact. It is also insisted by the defendants that the complainant company is an integral part of the Electric Bond and Share group of corporations and so interlocked with the corporation in Louisiana from which it purchases its gas, and the corporate purchasers from it in Tennessee, that they are component parts of the same enterprise and therefore liable for the tax. After a careful examination of all the proof and the entire record, the Court is of opinion that this contention of the defendants is not established. The Electric Bond and Share group of corporations do not dominate and control the complainant corporation and the complainant's dealings with the defendants distributing companies has been by contract entered into after much discussion and some delay, which constitute these distributing corporations buyers of gas from the complainant company in the ordinary course of trade, and not by reason of any dominating influence of a holding company.

The Court having concluded from the facts and the law that all of the earnings of the complainant company in the operation of its pipe line business during the years in question, were derived from interstate commerce, such earnings being expressly excluded by the terms of the sections of the Code hereinabove referred to, and the complainant is not liable for said excise tax and the temporary injunction heretofore granted should be made permanent.

Decree accordingly.

R. B. C. HOWELL, *Chancellor,*
Part One, Seventh Chancery
Division, Nashville, Tennessee.

March 1, 1940.

EXHIBIT "B".

Opinion Mr. Justice Green, Supreme Court of Tennessee on Petition for Supersedeas.

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

DAVIDSON EQUITY—Filed July 8th, 1938.

David S. Lansden, Clerk.

MEMORANDUM

In *Express Company* v. *Patterson,* 122 Tenn., 279, it was held that since the Legislature had provided no law for the assessment of intangible property of foreign corporations, the jurisdiction of the Chancery Court might be invoked to enjoin proceedings looking to that end.

To the same effect was *Fertilizer Company* v. *McFall,* 128 Tenn., 645.

For a stronger reason an injunction may be sought against proceedings by the State's fiscal officers to consummate a tax which the Legislature has expressly *excluded.* The corporation excise tax is imposed upon net earnings

"arising from business done wholly within the State, excluding earnings arising from interstate commerce." Code 1316.

The bill in this case avers that all the net earnings made the basis of the excise tax sought to be enforced arose from interstate commerce and sets out the facts in detail. There are certainly facts enough stated in the bill to call for an answer from the fiscal officers of the State by way of justifying the authority of the Commissioner in the premises.

In the Gasoline tax cases, 170 Tenn., 183, errors of judgment only were charged against the commissioners. Here his power—his jurisdiction—is challenged. The power and jurisdiction of tax officials or boards is open to inquiry in the Chancery Court and they may be restrained when acting beyond their authority or illegally. *Briscoe* v. *McMillan*, 117 Tenn. 115, *Smoky Mt. etc. Co.* v. *Lattimore*, 119 Tenn. 620.

I think the Chancellor did not exceed his jurisdiction in granting the injunction herein and the application for certiorari and supersedeas is denied.

GREEN, *C. J.*

EXHIBIT "C".

Majority Opinion of the Supreme Court of Tennessee.

COPY

MEMPHIS NATURAL GAS COMPANY

vs.

LEWIS S. POPE, ET AL.

DAVIDSON EQUITY—Filed May 17, 1941.

David S. Lansden, Clerk.

OPINION

The complainant, a Delaware corporation, domesticated in Tennessee with its chief place of business in Memphis,

Tennessee, filed the bill against certain officials and tax collectors of the State of Tennessee to enjoin the collection of excise taxes for the years 1932 to 1936 and for a declaration of rights, status and legal relations. An injunction was obtained to prevent the levies by distress proceedings.

The excise tax is that provided by 1932 Code, sec. 1316 et seq. It is alleged that the assessments are in violation of constitutional rights, asserting that the taxes are on the right to do business which is exclusively interstate commerce.

The bill was sustained by the chancellor and the injunction made permanent.

Upon appeal and proper assignments of error, extensive briefs and argument, the case is here. The essential facts which are presented by evidence supported by the pleadings are as follows:

The Memphis Natural Gas Company was promoted and organized in 1928 and it and Memphis Power & Light Co., were associated together by contract in furnishing natural gas brought from the gas fields at Monroe, Louisiana, into the State of Tennessee. Complainant brings the gas in pipe lines, the entire line with its branches in Tennessee extending 370.5 miles in length. Complainant has a contract with Memphis Power & Light Co., to distribute the gas to consumers in Shelby County, Tennessee, and with West Tennessee Power & Light Co., which distributes the gas to other places in West Tennessee.

The excise taxes for the years 1932-1936, both inclusive, enjoined, amounted to $57,156.83. Since the bill was filed the taxes for 1936 were withdrawn from the litigation by the defendants.

There are compressor stations along the transportation line at intervals to force the flow of gas. Complainant furnishes one buyer in Arkansas, the Arkansas Power and Light Company, and none in Mississippi.

The gas is delivered to Memphis Power & Light Co., at Brooks Avenue in Memphis, and nine other stations in Shelby County, with measuring meters at each. The gas is measured by the cubic foot, or, in thousands of cubic

feet. The meter instruments act by means of recorded pressure on charts.

The deliveries to West Tennessee Power & Light Company are at seven points by like measures of gas flow. By contract with West Tennessee Power & Light Co., complainant extended its pipe line at its own expense for purposes of delivery by main lines and laterals from Memphis to the towns of Covington, Brownsville, Ripley, Jackson and Humboldt in West Tennessee, and these lateral lines are owned and operated by complainant.

The flow from the fields in Louisiana is continuous until delivered at these stations. There is an attempt to obtain a constant pressure along the main pipe line at a much higher pressure than can be used in the distribution lines.

At these meter stations, where the gas is delivered by Memphis Natural Gas Company to the distributing corporations, an attempt is made by Memphis Natural Gas Company to obtain a constant pressure in order that the gas may be measured, and an apparatus is used to reduce the pressure as it enters the distribution systems. To do this it is necessary to keep in touch with the requirements of the various markets from hour to hour, and men are kept on the operations for this purpose. The stations are so operated to suit the conditions that prevail at any time. During certain hours of use, the load is diminished more rapidly and a regulator machine is used to control pressure.

Complainant uses a private telephone line extending the length of the pipe lines and a dispatcher is kept at Memphis to control the unput of gas and to report troubles. Line walkers and repair crews keep up the lines.

The books and records of Memphis Natural Gas Company are kept at Memphis in its main office, and its entire business is conducted from Memphis as its general headquarters. It owns its own pipe lines and purchase the gas from a producing company. The President of Memphis Natural Gas Company lives in Memphis. The offices consist of eight rooms, and approximately twelve people are employed in the offices.

The distributing lines and appliances for sale and distribution belong to Memphis Power and Light Company.

Each of these companies employs its own men and makes its own purchases of materials.

The per cent of revenues of Memphis Natural Gas Company derived from Memphis Power and Light Company, to its total revennes, was:

1932	83.24%
1933	83.08%
1934	81.47%
1935	80.06%

So that the bulk of all complainant's revenues from every source is derived from its business done with and through Memphis Power and Light Company.

These two corporations cooperated jointly in the scheme of bringing natural gas into Memphis and distributing it to the consuming public. For this purpose and coincidentally a franchise was obtained from the City of Memphis. This franchise runs in the name of Memphis Power and Light Company. However, at the same time, the contract hereinafter set forth was executed by and between Memphis Natural Gas Company and Memphis Power and Light Company and this contract was filed with the City as a part of the contract with the City by which the twenty-five year franchise was granted. A provision in the contract, which materially affects the obligations to the City of Memphis, representing the public and affecting the material rights of both these companies financially, will be referred to and explained later. The case, as we view it, largely turns upon the contract between these two companies, and with the City. This contract between the two companies is named a contract of bargain and sale. Memphis Natural Gas Company is called Seller and Memphis Power and Light Company is called Buyer; and it is argued that by its terms, Seller sells to Buyer all the gas it will need. The contract is complicated and long. A study of it leaves one with an impression that there was a studied effort to cover up a pooling of interests with the varnish of a sale. To understand it there is required more than surface inspection of the varnish. We must look through the gloss finish and see what is underneath.

It is argued by counsel for complainant that there is a sale of gas at a fixed price, subject to future adjustment; and that the gas is delivered to the buyer in direct flow of interstate commerce. Counsel for defendants contend that the provision for sale at a stipulated price is but part of a scheme of partnership in which the so-called seller is a partner with the buyer and engaged with it in the sale and distribution of gas to local consumers and that each party is interested in the business conducted by the other.

At the present time, under the Uniform Partnership Act in Tennessee, the word person includes Corporations; and in the provisions defining partnerships the word person is used in such way as to indicate that a corporation may be a partner. Code 7841, 7845.

The sharing by a person of profits of a business is *prima facie* evidence he is a partner in the business. Code 7846.

But, whether a corporation can technically become a partner, or whether it requires charter authority to become a partner, a corporation can make contracts in pursuance of its corporate powers that will bind it in joint adventures or undertakings. And, even without joint control of the operations that produce profits, persons or corporations may establish relationships that will result in a sharing of profits, each with the other. There is no law against two public utilities engaged in supplying gas to a community to so divide or parcel their work as to give each a separate management of a portion and then pool their earnings, regardless of the technical rules of partnership. The right to contract is free enough to include such an arrangement, and there is no vice in it.

One may be an agent of the other in details, but activities do not have to be classified to make them lawful.

In this contract of May 24, 1928, which was executed between Memphis Natural Gas Company and Memphis Power and Light Company, and presented to the City of Memphis to induce the City to grant the franchise, it was stipulated that the seller agrees to sell and the buyer agrees to buy, take and pay for such amounts of natural gas as may be requisite to fulfill all contracts for sale; and second, for the use by the buyer for its electric generating plant.

By the Fifth Article, the seller was to furnish, install, operate and maintain at its own expense a regulating and measuring station and meter the gas with certain temperature and specific gravity tests.

By the Sixth Article subject to adjustment provisions in Article Eleventh, certain graduated prices or rates, according to the class of use, were named.

By the Ninth Article, briefly stated, the seller monthly to deliver to buyer and to the city of Memphis, a statement setting forth in reasonable detail:

1. Seller's investment, including cost of pipe lines, installations, etc.

2. Gross revenues from sale of gas to seller.

3. All costs of maintaining and operating.

4. Costs of renewals, replacements, etc.

5. Amount necessary for a fifteen year 6% sinking fund to amortize seller's investment.

6. All taxes.

7. Six percent at the end of each year of seller's investment for extraordinary maintenance, renewals, replacements or amortization.

8. Net surplus or net deficit of seller for the contract year.

By the Tenth Article, buyer was to deliver, yearly, to seller and to the City of Memphis, the same information of its affairs and operations as those required of seller, listed above.

The Eleventh Article is lengthy, but its importance warrants its copy in full as follows:

"ELEVENTH: It is understood and agreed by the parties hereto that the amount of the combined net surpluses or combined net deficits of the buyer and the seller for each contract year, as shown by the statements rendered under Articles NINTH and TENTH hereof, shall (until after the provisions of the next succeeding paragraph shall have

become operative) be equally divided between the buyer and the seller by a cash adjustment to be made each year as soon as possible after the rendering of the statements provided for in Articles NINTH and TENTH hereof, and at the same time the parties shall agree upon such adjustments, if any, in the rates set forth in Article SIXTH hereof as may be calculated to be necessary in order as nearly as possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years.

If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles NINTH and TENTH hereof, shall have been made up and (b) in addition thereto, the buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half percent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article TENTH for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the seller and thereafter no further changes in the rates set forth in Article SIXTH hereof (or in such rates as theretofore adjusted under the foregoing provisions of this Article ELEVENTH) shall be made except such changes in such rates, if any, as may be required under the provisions of the next succeeding paragraph of this Article ELEVENTH. In all subsequent contract years, the entire balance of the buyer's net surplus for each subsequent contract year over and above an amount equal to one and one-half per cent of the amount of the buyer's investment shown under (7) of the statement rendered under Article TENTH for such subsequent contract year shall be paid to the seller.

In each and every contract year during the continuance of this agreement or any extension thereof after (A) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Article NINTH and TENTH hereof, shall have been made up and (B) in addition thereto, the Buyer shall have received from the combined net surpluses, as shown by such state-

ments, an amount equal to one and one-half per cent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article TENTH for each and every respective contract year up to such time, and (C) in addition thereto, the seller shall have received from the combined net surpluses, as shown by such statement, net earnings affording it a reasonable return in view of the hazards of the undertaking of the seller at the inception thereof, upon the respective amounts of the seller's investment shown under (7) of the statements rendered under ARTICLE NINTH for all contract years up to such time, then the seller and the buyer agree to and will cooperate to bring about a reduction in the rates to be charged by the buyer to its customers in the following manner:

1. The parties shall agree upon such adjustment in the rates set forth in Article SIXTH hereof (or in such rates as theretofore adjusted under this Article ELEVENTH) as may be calculated to be necessary in order as nearly as possible to reduce the operating expenses of the buyer in subsequent contract years by an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph, and

2. The buyer shall then reduce its rates to its consumers in such amount as may be calculated to be necessary in order as nearly as possible to effect a reduction in the gross revenues of the buyer for ensuing contract years in an amount equal to the balance of the combined net surplus for such contract year over and above the deductions contemplated by subdivisions (A), (B) and (C) of this paragraph. It is agreed that such reduction of rates by the buyer pursuant to the provisions of this paragraph of this Article ELEVENTH, shall be applied first toward lowering the price of gas to domestic consumers.

Each party shall have the right to examine the books, records, vouchers, and charts of the other party to the extent necessary to verify the accuracy of any statement, charge, or adjustment made pursuant to the provisions of

any Article hereof. If such examination reveals any inaccuracy in the statements, charges, or adjustments theretofore made, the necessary adjustment shall be promptly made.

The City of Memphis shall have the right by a reputable firm of certified public accountants or engineers, appointed by resolution of the City Commissioners, to examine the books and accounts of the parties hereto to the extent necessary to verify the accuracy of any statement or adjustment made under or pursuant to the provisions of said Articles NINTH, TENTH or ELEVENTH. If such examination reveals any inaccuracy in the statements or adjustments theretofore made, the necessary adjustments shall be promptly made."

There is filed copy of the franchise granted by the City of Memphis to the Memphis Power and Light Company until January 1st, 1958. This franchise shows that the contract between the pipe line corporation and the grantee is filed with the City and contemplates the cooperation of the two concerns, and provides a scale of rates to the consumers for gas. It is in this way indicated that the City is a contracting party with both these utility corporations.

The City of Memphis is a party to the contract in that, if Memphis Natural Gas Company realizes the net profits provided for on its investment from the inception of the enterprise, there is an adjustment of rates and the gas rate is reduced down to take up that excess profit. Thus we see complainant is dealing with the public in Memphis, represented by the City of Memphis.

The entire setup and the whole contract between the two companies and the public shows a joint understanding. Mr. Johnson, President of the complainant company, in cross-examination, was asked by Mr. Pope, a hypothetical question as follows:

"Suppose on the 10th day of January, 1935, the Memphis Power and Light Company had made enough profits on its business to have complied with all these conditions in here: that is, 6% we will say, the reasonable return to them, the same amount to you, and suppose they would have had $50,000 left over and above that, and after they had realized

one and one-half per cent on their investment, what would have become of that $50,000 under this contract?"

After much pressure by the attorney and much evasion by the witness, driving at the making and disposition of the supposed $50,000, witness said:

"I would not say it is made by the Memphis Power and Light Company."

Q. by Mr. Pope: "Who is it made by?"

Answer: "It is made by both of us."

The witness admitted the fallacy of his own position when he said such supposed $50,000 of net earnings had been made by both companies; and he finally was forced to admit that such supposed net balance would go under section Eleventh to the pipe line company. That resulted under the following provision in section 11 of the contract:

"If in any contract year (a) all the net deficits of both parties for all contract years up to such time, as shown by the statements rendered under Articles Ninth and Tenth hereof, shall have been made up and (b) in addition thereto, the buyer shall have received from the combined net surpluses, as shown by such statements, an amount equal to one and one-half per cent of each of the respective amounts of the buyer's investment shown under (7) of the statements rendered under Article Tenth for each and every respective contract year up to such time, then the entire balance of the combined net surplus for such contract year shall be paid to or retained by the seller. * * *"

It will be seen that by the above provision, not only is "seller" a participant in the profits of the distribution of gas in Shelby County by the Memphis Power and Light Company, but after a certain situation is reached the "seller" would receive all the remaining profits of the distribution.

It is not necessary to determine when title to the gas passed to Memphis Power and Light Company, or whether title ever actually passed. If title passed, then, still the business conducted in distributing to consumers was for and on behalf of both these development and oper-

ating corporations, and Memphis Natural Gas Company was engaged through its co-operative in intrastate business in Tennessee.

The price of gas, if there ever was an actual sale, was not and could not be determined until after the gas had been delivered to the ultimate consumer. Our view is, that there is not a fixed price in Article Sixth which is merely adjusted by Article Eleventh, but in reality there was an operation in which both companies were jointly interested. There was an allotment of work performed but a division of the entire results of that work.

Whether the scheme of separate corporate entity, but joint profit, was designed in the beginning for purposes of economy, safety in business and to escape taxation, is a matter which may very reasonably be concluded.

There seems to be separate corporate entity, as was found by the Chancellor. This does not preclude a conclusion that these gas companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and that the whole business is so intertwined as to make their business joint. The business done in Tennessee by complainant with the West Tennessee Power and Light Company amounted to approximately one or two (1%-2%) percent during the years in question.

The business done with Memphis Power and Light Company for its generating plant bore the following proportion to its total business with that company:

1932	33.49%
1933	33.22%
1934	27.78%
1935	24.34%

This gas furnished to the electric generating plant was on a straight buyer and seller contract basis to furnish gas on demand. This contract was separate from the distribution contract hereinbefore discussed, but was to take effect contingent on that one being executed.

It is improper to look alone to Article Sixth, which ostensibly shows a sale, but the whole arrangement must be seen. In illustrating a unit composed of many parts, the great

Apostle spoke of the human body as being many members in one body. He said "The eye cannot say unto the hand, I have no need of thee." This philosophy is the modern doctrine of construction.

Considering what is interstate commerce, the technical considerations of when things come to rest, or continuity of flow; of original package or the breaking up, and the like, are not the last word. In the whole field of law we find first, technical measurements, and then come practical considerations. Once we looked to controlling phrases, then later the four corners of the instrument. These are the processes of evolution in the law.

In the instant case we take Article Sixth for what it is worth and for what it was intended. It is a mathematical formula inserted to help in the measurement of profits, to be divided when complainant is given credit for the process therein mentioned as applied to the various uses to be made of the gas; and Memphis Power and Light Company is given credit for the sales to the various users of gas and the upkeep and amortization of invested capital is counted; and a certain stipulated profit is calculated, then the profits are divided among the entire enterprise.

We are not to be deceived by subtle arguments over passages considered singly. The whole field of the enterprise must be seen to comprehend it. It is considerably like two partners, one to buy and haul in, another to sell, with two bank accounts and two sets of books, and at the end of each year a division of profits. The buying partner turns in the goods at certain prices, but these prices are just figures. In the end there is a division. They are both merchants in the same enterprise.

There is testimony from which defendants say there is a union between these utility corporations. It is insisted from the evidence that Memphis Power and Light Company and West Tennessee Power and Light Company are registered subsidiaries of the National Power and Light Company, it being a subsidiary of Electric Bond and Share Company, owning 99.9% of the voting stock of Memphis Power and Light Company and 100% of the stock of West Tennessee Power and Light Company. Also, that com-

plainant is a part of the Electric Bond and Share Company group, by ownership of an interest in its stock.

The case of Lone Star Gas Company *v.* Texas, 304 U. S. 224, 82 L. ed. 1304 and other cases are cited, which hold that if a corporation sells gas in a state to associations or corporations having the same parent holding company, the business is intrastate commerce. There is exception to the competency of this evidence on the ground that the experts obtained their information from Moody's Manual and is therefore hearsay. Assignment of error is made by complainant on this appeal to the ruling of the chancellor admitting this evidence. We do not pass upon this evidence or its effect. The authorities so holding that such a combination is incompatible with the idea of interstate commerce is equal authority for a denial of the claim where the unity between the parties is a contractual bond.

Affiliated companies cannot be more effectually united than those bound together by bonds of joint adventure. The bond here is like the union of the Siamese twins. There are separate hands and feet and heads, but a union of the two bodies. That bond is the contract. The hands on one side bring in, and on the other distribute. Twin A gets half the money; Twin B gets the other half up to a certain point, and then Twin A gets it all. Counsel for complainant has what he calls his "paper book." It contains the cases from West Publishing Company leaves, collecting the various cases considering interstate commerce in natural gas transportation. While the cases are unlike the instant one, we are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to consumers by distribution or upon orders on demand, considering all its activities, it is intra-state business. This is true though the gas so furnished is drawn from interstate mains. Southern Natural Gas Corporation v. Alabama, 301 U. S. 148.

Many of the facts in the above case are like those here. As here, the complaining company was bringing gas from the fields in Louisiana into Alabama, where it had contracts with four purchasers, three of which were intrastate utilities and one, the Tennessee Coal, Iron and Railroad Company, purchased gas for itself and affiliated companies. The

complainant had a Delaware Charter but had domesticated in Alabama and had its chief office in Birmingham, where it conducted—as in this case—its entire business. It paid its annual required permit fee, as here. It constructed its lines reaching into Georgia. It possessed various items of property in Alabama, constituting its general transmission system. A majority of orders for gas were received by and cleared through the Birmingham office. All collections from sales were received and disbursements for expenses were made or authorized at that office. The sales to the Tennessee company and its affiliates were made from time to time upon orders given at the Birmingham office, given as the needs of the purchaser required. The gas sold was delivered in continuous movement from the gas fields without break or interruption to the point where it was delivered, viz: the meter house, where it was measured for the purpose of payment. The gas was moved under unregulated pressure. The pressure was reduced at the point of delivery for the accommodation of the purchaser to meet his requirements. The contracts with the companies contained provisions as to delivery, pressure, measurements, etc.

The measuring equipment belonged to seller. In the contract with the Tennessee company the seller provided at its expense service lines at the buyer's Bessemer plant and another plant, widely separated.

The main difference in the above case on the facts, to the facts here, consists in the seller providing the service lines to the Tennessee company, and the further fact that there was no association between seller and buyer as in the instant case. We regard the instant case a stronger one to support the tax because of this joint enterprise feature.

Chief Justice Hughes wrote the opinion affirming the Alabama Supreme Court, in which it was said:

"From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana it appears that appellant carried on in Alabama activities of an intrastate character."

As in other more recent cases, the Supreme Court apparently treated it as a case problem on all its facts.

Complainant charges in the bill that the excise taxes for the years 1932 and 1933 are barred by the Statute of Limitations of three years, the due date for payment being July 1st, 1933, and July 1st, 1934.

The Statute pleaded is section 1487 of our Code. It is attached to authority for back assessing taxes upon property, and the limitation is: "but no taxes on property for more than three years back shall be assessed and collected where they have not been assessed and not paid in consequence of the errors or omissions of former collectors or assessors."

On its face this only applies to property taxes. Counsel refer to an expression in Foppiano *v.* Speed, 113 Tenn. 167, 173. The tax there involved was a tax imposed upon persons selling beer, or any quantities of liquor on steamboats or any other vessel or watercraft, or from railroad cars; and they were required to pay a tax in lieu of all other taxes of $200 per annum. The Court said:

"The limitation of three years is fixed in analogy to the limitation fixed upon other back taxes."

The tax in that case was to take the place of any property or other tax. The tax here is a corporation excise tax which has no relation to property taxes. The tax here imposed is provided, not in the Article where the three year limitation is found, but in the Article on Excise Taxes—a different subject of taxation—which provides for a different system of collection by means of different officers therein designated. The collection is made by the Commissioner of Finance and Taxation. No limitation is provided by the Act.

There is a general limitation on collection of all taxes, of whatever nature, contained in Section 1494 of the Code, and fixes the time within six years. We think this six year limitation is the one applicable here, and not the limitation of assessors and collectors by county officials to back assess property. The tax analogy is not sufficiently complete for a court to set up by judicial construction a limitation imposed in a special but different situation.

The decree of the chancellor is reversed, the injunction dissolved and the bill dismissed at complainant's cost.

Defendants may take a reference for damages as against the injunction bond for the wrongful suing out of the injunction.

Mr. Justice Chambliss dissents.

FRANK T. FANCHER,
Special Judge.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis N. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal.)

EXHIBIT "D".

Concurring Opinion of Mr. Justice McKinney, of Supreme Court of Tennessee.

DAVIDSON EQUITY.

MEMPHIS NATURAL GAS COMPANY,

vs.

LEWIS S. POPE, et al.

OPINION

I concur in the conclusion announced in the majority opinion upon the ground that the involved tax can be sustained under the principles announced in *Southern Nat. Gas. Corp.* v. *Alabama*, 301 U. S. 148, 81 L. ed. 970, and

Atlantic L. Co. v. *Com'r of Corp. and Taxn.*, 298 U. S. 553, 80 L. ed. 1328. In those cases the court, in distinguishing them from that of *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, 69 L. ed. 439, emphasized the fact that oil was neither received nor delivered in Missouri, and indicated that had it been so received or delivered the result would have been different; and, as I interpret the opinion in the *Alabama* case, it makes no difference whether the delivery is to the consumer or distributor or to both.

In the instant cause, complainant piped the gas from Louisiana to Memphis, where, under one contract, a portion of it was turned into a smaller pipe and delivered to the municapility for consumption at its electric generating plant. Under another contract this gas delivered to the municapility at three or four other stations in Shelby County for distribution to its patrons. By a third contract complainant delivered gas to the West Tennessee Power & Light Company at six stations throughout West Tennessee for distribution to its patrons. This gas is delivered in greatly reduced pressure from that in which it is piped into Memphis, and complainant operates pressure control stations in Shelby County, Tennessee, for that purpose. This gas flows into Memphis in an 18-inch pipe where it is broken up and distributed in pipes varying in diameter from 10 inches to 3 inches. This, under my interpretation of the decisions of the Supreme Court of the United States, is, so to speak, 'a breaking of the original package,' which, in connection with the other activities of complainant in Memphis and other sections of West Tennessee, constitutes 'engaging in business in the state' so as to subject it to the tax.

(Signed) McKinney, *J.*

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis N. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal.)

EXHIBIT "E".

Dissenting Opinion of Mr. Justice Chambliss of Supreme Court of Tennessee.

DAVIDSON EQUITY.

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE, ET AL.

DISSENTING OPINION

I am constrained to dissent. It is clear and I think, in effect, recognized on the briefs of the State and in the opinion of the majority, that the flow of the gas in question is continuous across State lines into Tennessee to the points of delivery, without having come previously to a stop, to (1) Memphis Power & Light Company and (2) West Tennessee Power & Light Company, intrastate distributors of the gas. As I understand the holding of liability is rested on the theory and finding that the interstate seller and shipper and the intrastate buyer and distributors are co-partners, jointly interested in the business of gas distribution to consumers locally, the parties operating under a profit sharing plan, and that, therefore, the tax applies to all of the product conveyed through its pipe lines into this State from its wells in Louisiana. (This liability is held to apply not only to the gas sold and delivered to the Memphis Power & Light Company, whose relations with the Memphis Natural Gas Company are construed to have the effect above stated, but extended to the gas sold and delivered to the West Tennessee Company also.)

While this theory is stated forcefully and plausibly, I am unable to accept it. At last, upon analysis, the arrange-

ment between these Companies, conceded to be legally distinct corporate entities, held to constitute, in effect, a partnership, relates alone to the method and measure of the compensation which the interstate seller and shipper receives for its product from the interstate buyers and distributors.

No authority is cited for the adoption of the method or extent of payment by a buyer of goods shipped interstate, as a factor determining the taxability of the product. The opinion of Hughes, C. J., in *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, cited and quoted from in the majority opinion, does not adopt or discuss this theory of partnership profit sharing, or joint enterprise. Liability was predicated in this case on a finding that the Gas Company *itself*, not through another, "carried on in Alabama activities of an intrastate character," taking orders and making sales and maintaining service lines to various and sundry consumers, etc. The majority opinion concedes that in that case "there was no association between seller and buyer."

Not only do I find no case where such an "association" of the buyer and seller has been dealt with, but I am impressed that the opinion of Mr. Justice Cardoza in *People, ex rel. Pa. Gas Co.* v. *Saxe, et al.*, 229 N. Y., 446, announces the correct principle to the effect that the liability for taxes to a State on goods shipped into a State, does not turn on, and is not to be determined by, the amount, measure or method of compensation; and that a plan of payment under which the amount of compensation is determined by the profits earned by the buyer distributing the product does not deprive the interstate seller of the exemption inuring under the commerce clause. In that case the compensation of the interstate shipping Company was based on the gross receipts of the local distributor. The contracts were what is known as "requirement" contracts, that is, the amount delivered was determined by the requirements from time to time of the distributors. Cardoza, J., writing the opinion for the court, said, "We think the interstate character of the relator's business is untouched by these arrangements." Further, "the scale does not cease to be one in interstate commerce because the price is to be

measured by the purchaser's receipts." I think the arrangement in the instant case was a sales contract between the parties, with provisions, somewhat complicated, for regulation and adjustments of the price to be paid for the natural gas. I think the illustration suggested on the brief of counsel for the Natural Gas Company of the modernly common landlord and tenant lease contracts presents an apt analogy, the rental being based on the volume of business and incidental profits of the tenant. Here is a profit sharing compensation plan of fixing compensation, but the independence of the status of the parties is otherwise maintained, and the taxes, or other obligations of the parties are not affected. Another simple illustration: A, a seller, in Dakota, contracts with B; a Tennessee buyer, to sell and ship wheat in such volume as the buyer may require through a given season. The price to be paid A is based on a fixed minimum sum per bushel, plus fifty percent of any excess realized by the buyer from his sales of the wheat. Does this profit sharing arrangement defeat the interstate commerce immunity of the interstate shipment? I think not.

Since, as above indicated, I construe the holding of the majority opinion to be rested on the partnership in profits theory, I confine this brief comment to this theory. However, I have examined the opinion in *Southern Natural Gas Corporation v. Alabama*, and I think the facts so differ from those of the instant case as to distinguish determinatively the cases. In the *Alabama* case, as said in the opinion, "under its contract with the Tennessee Company, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office."

The Tennessee Company had a large number of these plants scattered over the State to which the Southern Natural Gas Company delivered gas through service lines which it owned and maintained, upon orders received and

filled from its Birmingham office from time to time. Nearly six hundred miles of its pipes covered the State and carried gas for allotment as required for distribution to these numerous consumer plants. I do not understand that the Memphis Natural Gas Company owned or maintained any service lines, but that the local companies tapped the main pipe line of the Natural Gas Company. The "distinction between the transportation of gas into a State and the furnishing of gas to consumers within the State," to quote the Alabama opinion, appears to have been preserved,—as it was not in that case. Many activities may be carried on within the State without subjecting the interstate transportation to the State taxing power, so long as these activities are merely incidental to the doing of the interstate business. *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S., 555. In that case it was said:

"The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business."

I do not find that the Memphis Natural Gas Company conducted any business in Tennessee which was not incident to, and in furtherance of, its interstate deliveries. These, briefly stated, being my views, I think the decree of the Chancellor should be affirmed.

CHAMBLISS, *J.*

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its De-

cember term, 1940, in case of Memphis N. Gas Co. against Pope, et al. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 17th day of May, 1941.

DAVID S. LANSDEN,
Clerk,

[SEAL]

EXHIBIT "F".

Opinion of Supreme Court of Tennessee on Petition to Rehear.

Copy

Filed June 28, 1941, David S. Lansden, Clerk

DAVIDSON COUNTY EQUITY

MEMPHIS NATURAL GAS COMPANY

v.

LEWIS S. POPE, ET AL.

MEMORANDUM ON PETITION TO REHEAR

The claim of constitutional right under Art. 1, Sec. 8, Clause 3 of the Federal Constitution was presented in the original bill of complainant and in briefs and argument. In refusing to sustain the bill and in holding that the business of complainant, furnishing gas in a joint undertaking with the distributing corporation, and in its business relationship as a whole was intrastate, obviously the claim of federally protected right was decided adversely to complainant.

The point now raised that some of the tax is based upon net earnings derived from sales of gas to Memphis Power & Light Company for use as fuel in its electric generating station and some from sale of gas to West Tennessee Power & Light Company for distribution by it and could not be a part of the earnings from the joint adventure with Memphis Power & Light Company in furnishing gas to the

public in Memphis and vicinity, and hence should be excluded from the tax on the theory of the majority opinion, is not discussed in the opinion. However, that point was apparent and was fully in mind. Though not stated in the opinion, our thought was—and is now—that complainant has not segregated any earnings so far as its brief and argument shows, and is not in the petition. It is not pointed out that there are any net earnings derived from the two sources mentioned. We failed to find in the proof and now fail to find any showing that the asserted tax claim sought to be enjoined contains any net profit from sources other than the vastly major operations, furnishing gas through Memphis Power & Light Company in complainant's intrastate business in Tennessee. Hence that point was not mentioned in the written opinion and we went no further to consider whether such possible earnings from the sale of power house gas and the West Tennessee gas were interstate or intrastate in character.

This suit is to enjoin collection of taxes. If it be true that there are some profits that might be ascribed to purely interstate commerce, such earnings should have been set out separately with proper definiteness of averment in the bill and then supported by proof and pointed out in brief in order to obtain the injunction. This has not been done.

It seems that though complainant might possibly have presented the question of elimination of some part of the profits outside of this joint business with Memphis Power & Light Company it has not done so, but has rested its case upon its much urged contention that *all* of its business was interstate in character.

The point that we have failed to eliminate the net earnings from business done in transporting the oil from the fields in Louisiana to Tennessee, is not well taken for this transportation is not interstate. This transportation to Tennessee is part of one whole scheme of business and cannot be separated from the distribution in Tennessee. Also, there is no basis pointed out by counsel whereby such a calculation can be made by the court.

We have not failed to give to the evidence by witnesses and other documents their proper consideration in construing the whole scheme and relationship from which the con-

clusion was reached that complainant is not engaged in interstate commerce.

All matters set up in the petition to rehear were fully considered by the court. The various opinions and authorities cited by petitioner were considered carefully. We see nothing in the petition to rehear that was overlooked in our former study of the case. We did not fail to give proper weight to the various federal authorities, though only a few were cited in the opinion. This case is different from any other in its facts, and many of the cases only afforded limited criteria in aid of a proper conclusion here.

Therefore we find no merit in the petition to rehear and it is Denied.

Mr. Justice Chambliss adheres to his original opinion in favor on complainant.

FRANK T. FANCHER,
Special Judge.

OFFICE OF CLERK OF THE SUPREME COURT FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, David S. Lansden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion of said Court, pronounced at its December term, 1940, in case of Memphis Nat. Gas Co. against Lewis S. Pope, et al., as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 28th day of June, 1941.

(Signed) DAVID S. LANSDEN, *Clerk.*

(Seal) By ..... D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, Attorney General of the State of Tennessee, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF AND ARGUMENT IN BEHALF OF MEMPHIS NATURAL GAS COMPANY, APPELLANT.

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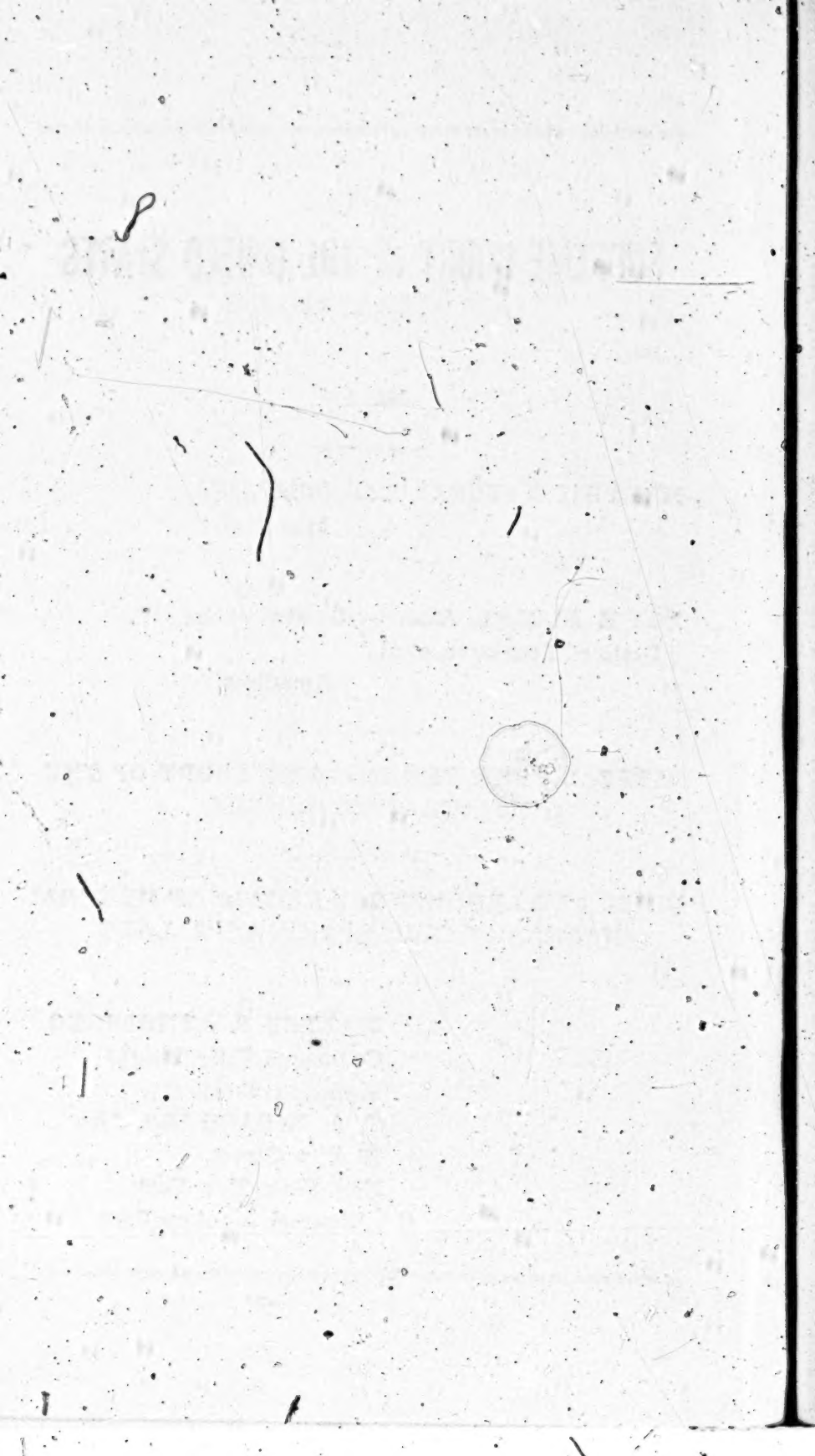

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IN THE

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OCTOBER TERM, 1941.

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ROY H. BEELER, Attorney General of the State of Tennessee, et. al.,
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APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF AND ARGUMENT IN BEHALF OF MEMPHIS NATURAL GAS COMPANY, APPELLANT.

OPINIONS DELIVERED IN THE COURTS BELOW.

No opinion delivered in either of the courts below has been officially reported and no one of the opinions has been published in any unofficial report. Therefore no reference is made either to any official or unofficial

report of these opinions. There are in the record five opinions delivered in the courts below.

(The Memorandum Opinion of Mr. Chief Justice Green of the Supreme Court of Tennessee, denying the Petition of Roy H. Beeler, Attorney General of the State of Tennessee, et al, for Supersedeas, and sustaining the jurisdiction of the Chancery Court of Davidson County, Tennessee to grant an injunction, is not in the record proper but is set out as Exhibit "B" to the Statement as to Jurisdiction, pp. 16-17.)

The first is the opinion of the Chancery Court of Davidson County, Tennessee, in which the cause originated. (Opinion of Chancery Court of Davidson County, Tennessee, R. 357-360; Statement as to Jurisdiction, pp. 13-16.)

The second is the Majority Opinion of the Supreme Court of Tennessee on Final Hearing, delivered by Mr. Special Justice Fancher. (R. 371-384; Statement as to Jurisdiction, pp. 17-32.)

The third is the Concurring Opinion of Mr. Justice McKinney, of Supreme Court of Tennessee, on Final Hearing. (R. 384-385; Statement as to Jurisdiction pp. 32-34.)

The fourth is the Dissenting Opinion of Mr. Justice Chambliss of Supreme Court of Tennessee on Final Hearing. (R. 385-389; Statement as to Jurisdiction pp. 34-37.)

The fifth is the Opinion of Supreme Court of Tennessee on Petition to Rehear, delivered by Mr. Special Justice Fancher. (R. 400-401; Statement as to Jurisdiction. pp. 38-40.)

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The purpose of this suit, which was instituted in the Chancery Court of Davidson County, Tennessee, against the Attorney General and the taxing authorities of the State of Tennessee, was to enjoin the enforcement against Memphis Natural Gas Company, appellant, of the excise statute of the State of Tennessee, on the ground that the appellant, a natural gas pipe line company, was solely engaged in transporting and selling natural gas in interstate commerce, and that the statute by its terms did not apply to the business of the appellant, and that if it were construed and held to apply to the business of appellant, then it was unconstitutional under Article I, Sec. 8, Clause 3, of the Constitution of the United States, in that it would attempt to impose a tax on the privilege of engaging in interstate commerce and would be an unwarranted burden on, regulation of, and interference with, interstate commerce. (Original Bill, R. 8-9.)

Thus there was drawn in question by appellant the validity of the statute, if construed so as to apply to the business of the appellant, on the grounds of its being repugnant to the Constitution of the United States and the provision thereof above set out.

It was further alleged that the application of the statute to the business of appellant would deprive it of a right, privilege and immunity guaranteed by the same constitutional provision.

The statutory provisions believed to sustain the jurisdiction of this court are Secs. 237 and 237(a) of the

Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928, as amended by the Act of April 26, 1928.

The statute thus challenged is found in Secs. 1316-1318 of the Official Code of Tennessee of 1932, and provides among other things that every corporation shall pay "annually an excise tax * * * equal to three per cent. of the net earnings" for its preceding fiscal year "arising from business done wholly within the state, excluding earnings arising from interstate commerce."

These sections of the Tennessee Official Code are set out in full in appellant's Statement as to Jurisdiction, (Statement as to Jurisdiction pp. 2-3) and for convenience are reprinted as Appendix "A" to this brief.

It is uniformly held by the Supreme Court of Tennessee that "the tax levied by this Act is a privilege tax upon domestic and foreign corporations *organized for profit and carrying on business in this State.* * * *Corporations not doing business in the State and those that derive no net earnings from business done in the State are not subject to the tax.*"[1] *Quicksafe Mfg. Corp. vs. Graham*, 161 Tenn. 46 at 48; *Bank of Commerce & Trust Co. vs. Senter*, 149 Tenn. 569.

The thing taxed being the privilege of doing business in the state, the statute is entirely unlike that involved in *Stone vs. Interstate Natural Gas Co.*, 103 Fed. (2d) 544 (C.C.A. 5th), affirmed 308 U. S. 522, where, in the language of the Circuit Court of Appeals, "the tax is laid on a domestic organization because of its mere

[1] Italics here and elsewhere supplied.

existence capitalized and ready to carry on its corporate activities. It need not do anything to incur it." (103 Fed. (2d) at 548.)

There was no question of the power of the Chancery Court to enjoin the enforcement of the statute against appellant, if either by its terms it did not apply to appellant or if constitutionally it could not be construed so to apply. (Opinion, Chief Justice Green, Statement as to Jurisdiction, pp. 16-17; Majority Opinion, Supreme Court of Tennessee, R. 371-384; Opinion, Supreme Court of Tennessee on Petition to Rehear, R. 400-401.)

The appellant in its Original Bill not only insisted that the statute properly construed did not apply to its business but that the construction or application of the statute so as to exact from it the excise tax would bring the Act under the inhibition of Article I, Sec. 8, Clause 3 of the Constitution of the United States, and would deprive appellant of a right, privilege and immunity guaranteed by the same provision of the Constitution of the United States. (R. 8.)

The Chancellor did not find it necessary to pass upon these constitutional questions, inasmuch as he held that the statute by its express terms did not apply so as to impose an excise tax upon appellant's business. (Opinion of Chancellor, R. 357-360.)

The appellant, having prevailed in the Chancery Court, was appellee in the Supreme Court of Tennessee, and in its brief in that court not only insisted that the Chancellor was correct in his holding as to the statute, but further insisted that any other construction or applica-

tion of the statute would render it invalid under Article I, Sec. 8, Clause 3 of the Constitution of the United States, and would deprive appellant of a right, privilege and immunity guaranteed by the same provision of the Constitution of the United States. (R. 369-370.)

Appellant, among other things in its brief, stated:

> "... it is our submission that any other construction or application of the statute to the transactions here involved different from that made by the Chancellor would immediately bring the statute as so construed and applied in conflict with the commerce clause of the Federal Constitution." (R. 369.)

And again:

> "Our insistence is that not only has the state expressly refrained from taxing interstate commerce, but that it does not possess the power to impose a tax upon the business in which the complainant was engaged in the years 1932 to 1935, and that if either this statute or any other statute had taxed the business of complainant during those years, as is now attempted to tax it, such a statute and its application would have been unconstitutional."
>
> (Appellant's Brief in the Supreme Court of Tennessee, R. 370.)

In this connection Article I, Sec. 8, Clause 3 of the Constitution of the United States was expressly relied upon.

The first time the statute was construed and applied so as to place this excise or privilege tax on appellant's interstate business was when the Majority Opinion was delivered by the Supreme Court of Tennessee. (Majority Opinion, Supreme Court of Tennessee, R. 371-384.)

The appellant immediately filed a Petition to Rehear, in which it asserted that this construction and application of the statute rendered it invalid and within the inhibition of Article I, Sec. 8, Clause 3 of the Constitution of the United States, conferring upon Congress the power to regulate interstate commerce. (R. 391-394.)

The Supreme Court of Tennessee, in its opinion overruling this petition, expressly recognized that the federal question had been made and stated that "obviously the claim of federally protected right was decided adversely to complainant." (Opinion of Supreme Court of Tennessee on Petition to Rehear, R. 400.)

Though their statement in regard to it is not entirely correct, appellees do in effect admit that the appellant properly drew into question the validity of the statute. That statement is: "The asserted invalidity of these code sections is based on what appellant conceives to be a conflict with the commerce clause of the Constitution of the United States. This contention was first made in the Supreme Court of Tennessee and was not seriously pressed there." (Appellees' Statement Opposing Jurisdiction and Motion to Dismiss the Appeal, p. 1.)

This statement is not entirely accurate because it is not correct to say that this contention was first made in the Supreme Court of Tennessee. It was made in the Chancery Court and was made in the Supreme Court of Tennessee both in the original and reply briefs of appellant and in its Petition to Rehear. Regardless of this, however, concededly it was properly made.

When as in this case a statute is fair on its face and yet is so construed and applied as to be counter to Article I, Sec. 8, Clause 3 of the Constitution of the United States, one who challenges this construction and application draws in question the validity of the statute, under Secs. 237 and 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the cause may be removed to this Court by appeal (formerly by writ of error). *Merchants National Bank of Richmond vs. City of Richmond*, 256 U. S. 635.

This is necessarily true because no matter how fair a statute may be upon its face, the construction given it by the Supreme Court of the state is conclusive upon this Court and regardless of its wording the statute must be read with the gloss furnished by the opinions of the state supreme court.

In *Eureka Pipe Line Co. vs. Hallanan*, 257 U. S. 265, a West Virginia statute forbade the engaging in the business of transporting petroleum by pipe lines without the payment of tax of two cents per barrel. The Supreme Court of Appeals of West Virginia held that the statute applied to intrastate commerce, but nonetheless construed it as applying to oil which was produced in West Virginia and transported by the pipe line company without the state. It was urged upon this Court that inasmuch as the West Virginia court had held that the Act applied only to commerce within the state, there was no jurisdiction of writ of error "because there is (was) no question as to the validity of a statute so limited." It was further "argued that the mistake, if any, was not in approving the statute, but in the court's conception of interstate commerce."

This Court, however, in an opinion by Mr. Justice Holmes, rejected this argument and said:

> "But we must look at what the court has done, not at its mode of reaching the result. What it has done is to decide that the statute covers all the oil produced in West Virginia, and that it shall be upheld in so doing. The nature of the mistake that induced the act is immaterial. A case would not be withdrawn from the jurisdiction of this court in error by a declaration that a statute was addressed only to intrastate commerce if it was applied wholesale to freight passing across the continent. The fact that the error was less does not affect the principle involved. But, furthermore, the court only confined the statute to intrastate commerce 'as above defined;' that is, to commerce that embraced what the plaintiff carried on." (257 U. S. 265, at 270, 271.)

Mr. Justice Clarke, dissenting, was of the opinion that the remedy was by certiorari and not by writ of error and in this dissent as to jurisdiction Mr. Justice Brandeis joined. (257 U. S. 265, at 273-277.)

See also *United Fuel Gas Co. vs. Hallanan*, 257 U. S. 277.

On the same day on which the two last mentioned cases were decided, this Court reiterated its holding in an opinion by Mr. Justice Van Devanter in *Dahnke-Walker Milling Co. vs. Bondurant*, 257 U. S. 282, in which the Court of Appeals of Kentucky had applied a Kentucky statute, prescribing conditions on which corporations of other states might do business in that state, to a transaction which this Court found to be of an interstate character. The Court held that regardless of the wording

of the statute, when so applied the remedy was by writ of error (now appeal), and said:

> "Our conclusion on the jurisdictional question is that, as the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error." (257 U. S. 282, at 290.)

Mr. Justice Brandeis and Mr. Justice Clarke dissented.

In addition to drawing in question the validity of the Tennessee statute, appellant expressly claimed that its right, privilege and immunity asserted under Article I, Sec. 8, Clause 3 of the Constitution of the United States, had been denied by the construction and application of the statute made by the Supreme Court of Tennessee. (R. 8, 369-370, 392, 394, 400.)

Under former practice this claim, if it alone had been asserted, would have furnished the basis for petition for certiorari. (Judicial Code, Secs. 237 and 237(b) as amended.)

Inasmuch as an appeal improvidently sought and allowed will now be treated as a petition for certiorari, at this stage of the case, "the objection," as Mr. Justice Holmes said in *Eureka Pipe Line Co. vs. Hallanan*, 257 U. S. 265, at page 270, "would be immaterial were we not required to determine upon which proceeding the decree should issue."

Secs. 237 and 237 (c) of the Judicial Code, as amended by Act of February 13, 1925, and Act of January 31, 1928, as amended by the Act of April 26, 1928.

Whether appellant is entitled to appeal because it drew in question the validity of the Tennessee statute as construed and applied by the Supreme Court of that state, its court of last resort, or whether it is entitled to a review by this Court as if it had filed a petition for certiorari because it also claimed a constitutional right and privilege under Article I, Sec. 8, Clause 3 of the Constitution of the United States, there can be no question as to the substantial nature of the Federal right involved.

Appellant insisted that its earnings, on which it was sought to levy the excise-privilege tax, were derived solely from interstate transportation and sale of gas, and that the only acts done in Tennessee in respect to the transportation and sale were maintaining the pipe lines, reducing the pressure of gas that it might be delivered, metering the amount delivered and related office work, and that these activities were entirely incidental to interstate commerce and that, therefore, they came within the protective rulings of *State Tax Commission of Mississippi vs. Interstate Natural Gas Co.*, 284 U. S. 41; *East Ohio Gas Co. vs. Tax Commission of Ohio*, 283 U. S. 465; *Ozark Pipe Line Corp. vs. Monier*, 266 U. S. 555; *Missouri, ex rel. Barrett vs. Kansas Natural Gas Co.*, 265 U. S. 298; *Penn. vs. W. Virginia*, 262 U. S. 553; *Eureka Pipe Line Co. vs. Hallanan*, 257 U. S. 265; *Public Utilities Commission of Kansas vs. Landon*, 249 U. S. 236.

In this connection appellant contended that in all instances its main pipe lines were tapped by the distributing companies which distributed the gas and by its one Tennessee consumer, and that in no case did it have any service lines or service the gas, and that therefore its activities did not fall within the scope of the decision of

this Court in *Southern Natural Gas Corporation vs. Alabama*, 301 U. S. 148.

The Supreme Court of Tennessee intimated that the appellant did engage in intrastate business by servicing customers. (Majority Opinion of Supreme Court of Tennessee, R. 382-383.)

The Supreme Court of Tennessee further held that the appellant engaged in intrastate business because it found that appellant was engaged in some kind of joint enterprise or partnership undertaking with a local distributor, Memphis Power & Light Company. (Majority Opinion of Supreme Court of Tennessee, R. 373-381.) As we shall fully point out in our Statement of the Case and Argument, the record supports neither finding; therefore, the Supreme Court of Tennessee erred in construing and applying the statute so as to impose an excise-privilege tax upon appellant's earnings derived solely from interstate commerce, because the effect of this was to tax the appellant for the privilege of engaging in interstate commerce.

STATEMENT OF THE CASE.

Question Presented.

The question presented in this case is whether the excise-privilege tax provided for in the Tennessee statute heretofore quoted from, and set out in full as Appendix "A," can be imposed upon appellant's earnings for the years 1932-1935 inclusive. Appellant's submission is that these earnings are immune from this tax because they were derived solely from interstate commerce and the imposition of the tax upon them would result in taxing the privilege of engaging in interstate commerce.

Nature of Business from Which Appellant's Earnings Were Derived for Tax Years in Question.

During the years in question appellant's entire earnings were derived from the interstate transportation and sale of natural gas. (R. 118.)

The appellant, a Delaware corporation, was the owner and operator during these years of an interstate gas pipe line 369.86 miles in length, extending from the gas fields near Monroe, Louisiana, through the states of Arkansas, Mississippi and into and through part of the State of Tennessee. (R. 33-36; Exhibits "A" and "B" to Tes. Henry C. Wallace, R. 33, 460A, 36, 461.)

Appellant originally purchased the natural gas transported by its pipe line under a gas purchase contract from United Gas Pipe Line Company. The delivery of this gas was made to appellant at its compressor station near Monroe, Louisiana. (R. 34; Exhibit "A" to Tes. Henry C. Wallace, R. 33, 460A.)

This gas, by means of compressor or "booster" stations was transported in appellant's gas pipe line through the states of Louisiana, Arkansas, Mississippi and into Tennessee. During the years in question, however, no compressor or booster station was operated by appellant in the State of Tennessee. (R. 36, 37, 48-49, 87, 106, 157.)

At points along the pipe line outside the State of Tennessee three customers, public utility distributing companies (one in Louisiana, one in Arkansas and one in Mississippi), tapped the pipe line and received gas under gas purchase contracts. (R. 38, 69.)*

* The following statement in the Majority Opinion of the Supreme Court of Tennessee is inaccurate: "Complainant furnishes one buyer in Arkansas, the Arkansas Power and Light Company, and none in Mississippi." (Appellant's Statement as to Jurisdiction, R. 372.)

In Tennessee two purchasers, public utility distributing companies (in Shelby County, Tennessee, Memphis Power & Light Co., in points in Tennessee outside of Shelby County, West Tennessee Power & Light Company) tapped appellant's main pipe line system and received gas under purchase contracts which had been entered into in the State of New York. (R. 40, 102; Exhibits "A," "B," "C." Tes., Birger L. Johnson, R. 103, 509-540; 104, 540-550; 104, 550-565.)

Appellant's customers tapped its interstate main gas pipe line system at various points, known as "city gate meter or measuring stations." (R. 40, 41.) This gas moved in a continuous flow out of appellant's main pipe line into the pipe lines of the two Tennessee public utility distributing companies, which companies sold and delivered gas to their local customers. (R. 40, 41, 105-106, 108, 115-116, 157.)

At the time of the withdrawal of the gas for the purpose of, and necessarily incident to, its delivery appellant measured the gas by meter and its pressure was reduced in some instances to an average of 100 pounds per square inch. (R. 42, 43, 49, 50, 57, 107, 158.)

Most of the gas which Memphis Power & Light Company received from the appellant was received at what is known as the Brooks Avenue Station in Shelby County, Tennessee. After receipt, Memphis Power & Light Company transported the gas to its Kansas Street Station in Memphis, and thence part to its generating plant for consumption and the remainder to its customers. (R. 32, 54, 55, 76, 77, 95, 188.)

The natural gas which appellant's customers thus obtained by tapping appellant's main gas pipe line system was at all times in continuous flow; none of the gas came to rest in Tennessee. Appellant did not own or operate any tanks, reservoirs or storage equipment in Tennessee. The gas was not treated or processed in any way. Nothing was extracted from it and no other gas was mixed with it: (R. 41, 45, 51, 96, 107, 108, 126, 147, 156, 189.)

All of complainant's pipe lines in Tennessee were main pipe lines. There were 6.9 miles of 18 inch line, 59.47 miles of 10 inch, 39.5 miles of 8 inch, 11.52 miles of 6 inch, 5.17 miles of 4 inch, .7 miles of 3 inch. (R. 34, 35; Ex. "B" to Tes., Henry C. Wallace, R. 36, 461; 111.)

Exhibit "A" to the Testimony of Henry C. Wallace (R. 33, 460A) is a map showing appellant's pipe line system. This map should be read in connection with Exhibit "C" to the Testimony of the same witness (R. 55, 479), which is a schedule showing dates of installation of delivery stations in Tennessee.

During the years involved here there was in Shelby County, Tennessee (Memphis), one main delivery point at Brooks Avenue, the terminus of appellant's 18 inch pipe line. There were three other delivery points to Memphis Power & Light Company in Shelby County: Whitehaven, Holly Ford Road and Oakville. Each of these is a small community served by Memphis Power & Light Company, which took delivery of the gas at points adjacent to the communities served by tapping appellant's main pipe line to Jackson, Tennessee. (R. 55, 56.)

In West Tennessee outside of Shelby County deliveries were made during the years in question to West Tennessee Power & Light Company at the "City Gates" of the following municipalities:

In Tipton County—Covington.
In Lauderdale County—Henning and Ripley.
In Gibson County—Humboldt.
In Madison County—Jackson.

(R. 42, 55, 480.)

See Agreement between Memphis Natural Gas Company and West Tennessee Power & Light Company. (R. 104, 550.)

Complainant did not own or operate or maintain any service lines, service equipment or any instrumentality of any kind which was or could be used in the local distribution of natural gas in the State of Tennessee, and complainant did not have any ownership or control of natural gas received by its customers in Tennessee after it had passed the meter stations at the points of delivery and into the pipe lines of the public utility distributing companies. (R. 45, 46, 56, 77, 105, 106, 107, 115, 116.)

The described method of appellant's operation was the same in each of the tax years in question. (R. 33.)

Background of Appellant's Organization.

In 1927 and prior thereto there was no distribution of natural gas in the City of Memphis. Manufactured gas was generated and distributed by Memphis Power & Light Company for cooking, water heating and a limited number of other uses. In that year the Memphis Chamber of Commerce was approached by an Alabama lawyer who had conceived the idea that it was desirable to bring natural gas to Memphis from the gas fields in order to

substitute it for manufactured gas, and to extend the use of natural gas to uses beyond those which had been feasible for manufactured gas. (R. 150, 151, 152, 153.)

Representatives of the Chamber of Commerce began negotiations with Memphis Power & Light Company in an effort to effect some arrangement by which the latter company would undertake the distribution of natural gas. Memphis Power & Light Company strongly and continuously opposed this plan, taking the position that the distribution of natural gas would be an unprofitable venture for it. To overcome this opposition representatives of the Chamber of Commerce approached the municipal authorities of the City of Memphis for the purpose of obtaining their cooperation in the bringing of natural gas to Memphis. (R. 150-151, 152-153.)

The City indicated that if Memphis Power & Light Company continued to oppose the venture and to decline to distribute natural gas, it would grant a franchise to a new company for the distribution of natural gas in Memphis, in competition with the manufactured gas which was distributed by Memphis Power & Light Company, whose franchise was not exclusive. (R. 150, 151, 153.)

A 1928 Delaware charter was obtained by Memphis Natural Gas Company, which charter was filed in the State of Tennessee that year. (R. 155; Ex. "A" to Tes., Brantley, R. 205, 208.) The company was financed by the sale of bonds, preferred and common stock and actual transportation of gas began January 1, 1929. (R. 153-160.)

Faced with the threat of competition Memphis Power & Light Company capitulated and agreed to distribute natural gas, under the terms of a contract which will be hereinafter more fully referred to. (R. 150-153.)

Appellees have unsuccessfully contended throughout this litigation that Memphis Natural Gas Company was an integral part of the Electric Bond & Share Company system and that Memphis Power & Light Company was a component of the same system, and that therefore because of this relationship Memphis Natural Gas Company, notwithstanding the interstate character of its transportation of natural gas, was nonetheless doing intrastate business in Tennessee. In view of this contention we briefly relate the facts upon which this claim is based. (See Tes., Beerman, R. 231, et seq.)

National Power & Light Company owned the majority of the voting stock of Memphis Power & Light Company. Electric Bond & Share Company owned 46.59 of the voting stock of National Power & Light Company. Shortly after the contract was entered into between Memphis Natural Gas Company and Memphis Power & Light Company, National Power & Light Company received 25% of the stock of Memphis Natural Gas Company, a percentage which was later reduced to 16.3% as a result of the issuance of other stock by Memphis Natural Gas Company (R. 119, 191, 192, 199.) At one time O. H. Simonds, and at another H. C. Abell, and at another Walter P. Armstrong, were directors of both Memphis Natural Gas Company and Memphis Power & Light Company. At no time did a majority of the Board of Directors of Memphis Natural Gas Company consist of persons who had any business relation with the Elec-

tric Bond and Share Company or any of its affiliates. (R. 172, 175, 202.)

Not only did Memphis Power & Light Company oppose the formation of Memphis Natural Gas Company and introduction of natural gas in Memphis, but it expressly declined to participate in the financing of this company. (R. 123.)

At all times the dealings between Memphis Power & Light Company and Memphis Natural Gas Company were at arm's length and when the so-called contractual settlements between the two companies were being discussed, they became exceedingly acrimonious, and litigation was threatened. (R. 90, 91, 112, 113, 115, 142, 164.)

At no time did Memphis Power & Light Company, National Power & Light Company, Electric Bond & Share Company or any associate or affiliate of Electric Bond & Share Company, ever dominate or attempt to dominate Memphis Natural Gas Company. (R. 90, 115, 116, 118, 160, 161, 202.)

On the contrary 48% of the voting stock of Memphis Natural Gas Company was owned by Commonwealth Gas Corporation. Four of the seven members of the Board of Directors of Memphis Natural Gas Company were members of the Board of Directors of Commonwealth Gas Corporation. The policies of Memphis Natural Gas Company were subject to the controlling influence of Commonwealth Gas Corporation. There was a management contract between Memphis Natural Gas Company and Commonwealth Management and Engineering Company, a wholly owned subsidiary of Com-

monwealth Gas Corporation. This contract authorized Commonwealth Management and Engineering Company to contract among other things for the purchase on behalf of and in the name of Memphis Natural Gas Company of such labor, material, apparatus and supplies as Commonwealth Management and Engineering Company should deem necessary for the operation of the properties and business of Memphis Natural Gas Company. There was no connection of any kind between Electric Bond & Share Company, or any of its affiliates, and Commonwealth Gas Corporation. (R. 52, 62, 73, 100, 131, 132, 177; Ex. "D," Tes. Henry C. Wallace, R. 64, 480, 484.)

Thus it is apparent that neither Electric Bond & Share Company, nor any of its associated or affiliated companies, in any wise dominated or controlled Memphis Natural Gas Company. Memphis Natural Gas Company did purchase its gas in the field from one of the Bond and Share Company group, but when the contract was entered into it was not only entered into at arm's length but no one representing Memphis Natural Gas Company at that time knew that the producing company had any connection with Electric Bond & Share Company. Memphis Natural Gas Company's customers in Mississippi and in Arkansas were Electric Bond & Share Company's subsidiaries. (R. 154.)

Mississippi Power & Light Company at one time lent Memphis Natural Gas Company $200,000.00 and Arkansas Power & Light Company at one time lent Memphis Natural Gas Company $120,000.00. Each of these was a simple business transaction and was made because

the respective distributors, Arkansas Power & Light Company and Mississippi Power & Light Company wished to enter new fields and to have Memphis Natural Gas Company transport its gas in interstate commerce and deliver it at new points to these distributors. Memphis Natural Gas Company was not in position to finance these undertakings and hence the temporary loans, which have now been repaid. (R. 181, 182, 197, 198.)

No opinion rendered by the Supreme Court of Tennessee was based on the finding of any corporate integration. These facts are related, however, in anticipation that this claim, which has been consistently made by appellees, will be pressed in this Court.

Appellant's Tennessee Office.

From 1932 to 1935 Memphis Natural Gas Company maintained an office in Memphis, Tennessee, having about 350 to 400 square feet of office space and 12 employees, consisting of accountants, bookkeepers and clerks, and all of the business transacted in this office was incidental to the transportation and sale in interstate commerce of natural gas and consisted of taking care of the payroll of the laborers on the line, billing Memphis Power & Light Company, West Tennessee Power & Light Company, Louisiana Power & Light Company, Arkansas Power & Light Company and Mississippi Power & Light Company and other such incidental matters. (R. 44, 60, 61, 91, 92, 135, 136, 147, 148, 159.)

Contract by Which Memphis Natural Gas Company Sold Gas to Memphis Power & Light Company To Be Distributed by the Latter Company to Customers of Memphis Power & Light Company.

By the terms of this contract Memphis Natural Gas Company agreed to sell to Memphis Power & Light Company its requirements of natural gas for resale for a period of fifteen years, with a provision for a ten year extension if the gas supply continued available. (Exhibit "A," Tes. Birger L. Johnson, R. 103, 509.)

In order to equip itself for doing so, Memphis Natural Gas Company agreed to construct a pipe line with an initial capacity of 60,000,000 cubic feet daily, and susceptible of expansion. (*Ibid*, R. 510.)

Memphis Power & Light Company agreed to extend its line to the delivery point agreed upon and to adapt its distribution system to natural gas. (*Ibid*, R. 510-511.)

The gas delivered by Memphis Natural Gas Company was to be measured by meters installed by that company, with the right in Memphis Power & Light Company to install checking meters and to test Memphis Natural Gas Company's meters. Before the 15th of each month a statement was to be rendered by Memphis Natural Gas Company for the gas delivered the preceding month, which statement was to be binding unless excepted to within ten days. The schedule of prices depended upon the purpose for which Memphis Power & Light Company resold the gas. This was to be determined by an examination of the meters and books of Memphis Power & Light Company. At the end of each year there was to be an adjustment between the companies. (*Ibid*, R. 511-517.)

In arriving at the amount then owed by one company to the other, the following formula was to be applied:

Memphis Natural Gas Company was assumed to have made an initial investment of $7,300,000.00, to which was to be added any capital additions, subject to reduction, however, by the extent to which its facilities were used to supply customers other than Memphis Power & Light Company. From the gross receipts from gas sold Memphis Power & Light Company there were to be deducted maintenance and operating costs, reasonable charges for renewals and replacements, an amount necessary to amortize on a fifteen year sinking fund basis the investment of Memphis Natural Gas Company, excluding maintenance and renewals and replacements, the amount paid for taxes and 6% on its investment. The result was the net "surplus" or "deficit" of Memphis Natural Gas Company. (*Ibid*, R. 517-520.)

Memphis Power & Light Company was assumed to have made an initial investment of $6,300,000.00 to which was to be added additions to its natural gas distribution system. From its gross revenues from the sale of natural gas were to be deducted the cost of maintenance and operation of its natural gas department, reasonable charges for renewals and replacements, a sum sufficient to amortize *the additions*, excluding maintenance and renewals and replacements, upon a fifteen year, 6% sinking fund basis, the amount paid for taxes and 6% on its investment, arrived at as above stated. The balance was to be the net "surplus" or "deficit" of Memphis Power & Light Company. (*Ibid*, R. 520-522.)

The purpose of arriving at these net "surpluses" and "deficits" was to use them as a yardstick for adjustment of the schedule of prices to be paid for various classes of gas as set out in Article Sixth of the contract. That schedule of prices was tentative and when the net surpluses and deficits were arrived at there was to be a cash adjustment at that time and then a change in the schedule of prices so as to effect, so far as could be foreseen, an equal rate of return to each Company. (*Ibid*, R. 522.)

Subsequent to this adjustment of prices, if at any time the deficits of the two companies were made up and Memphis Power & Light Company obtained from its Gas Department a 7½% return on its investment, and Memphis Natural Gas Company "a reasonable return in view of the hazards of the undertaking." (*Ibid*, R. 523) for previous years, the probability of a future surplus beyond this was to be eliminated by a reduction of the charges of Memphis Natural Gas Company to Memphis Power & Light Company and reductions by Memphis Power & Light Company of the rates charged its customers, the consumers. (*ibid*, R. 522-524.)

The contract provided not for a division of profits and losses, but was solely an agreement whereby the amount to be paid for the gas delivered by the Seller, Memphis Natural Gas Company, to the Buyer, Memphis Power & Light Company, was to be fixed and adjusted according to the result reached by the application of the formulae set forth in Articles Ninth, Tenth and Eleventh. (*Ibid*, R. 517-524.) The determinative language of the contract itself clearly established that these formulae for the annual contractual statements (set forth in Articles Ninth, Tenth and Eleventh) were simply the norm or

yardstick whereby the base rates of Article Sixth were to be adjusted.

Article Sixth definitely referred to these formulae in the following words:

> "*Sixth*: Subject to adjustment in accordance with the provisions of Article Eleventh hereof, the Buyer shall pay the Seller monthly for gas purchased hereunder during the preceding calendar month at the following rates:"
>
> (Here follow the base rates subject to such adjustment.) (*Ibid*, R. 515-516.)

It is clear, therefore, that the items to be adjusted were the "rates" to be paid by Buyer, Memphis Power & Light Company, to Seller, Memphis Natural Gas Company, and that the rates so adjusted constituted the ultimate price paid for the gas delivered by Memphis Natural Gas Company in interstate commerce under the above mentioned contract. (*Ibid*, R. 509-540.)

OPINIONS OF SUPREME COURT OF TENNESSEE

Majority Opinion of Supreme Court of Tennessee.

Mr. Special Justice Fancher, who delivered the Majority Opinion of the Supreme Court of Tennessee, treated as inconsequential the fact that appellant had filed its charter in Tennessee and maintained in Tennessee an office, for neither of these facts is referred to by him. He also rejected the idea of any corporate integration between the appellant and Electric Bond & Share Company, by saying that: "There seems to be separate corporate entity, as was found by the Chancellor." (R. 380.)

It is not entirely clear from his opinion as to whether he thought that the business of the appellant was such as to bring it within the rule of *Southern Natural Gas Corp. vs. Alabama*, 301 U. S. 148.

He did say:

> "While the cases are unlike the instant one, we are justified in holding that though the gas has come into Tennessee in a movement that is interstate in character, yet when it is sold to consumers by distribution or upon orders on demand, considering all its activities, it is intra-state business. This is true though the gas so furnished is drawn from interstate mains. Southern Natural Gas Corporation vs. Alabama, 301 U. S. 148." (R. 382.)

However, after fully discussing *Southern Natural Gas Corp. vs. Alabama*, he contrasted it with the case at bar by saying:

> "The main difference in the above case on the facts, to the facts here, consists in the Seller providing the service lines to the Tennessee company, and the further fact that there was no association between Seller and Buyer as in the instant case. We regard the instant case a stronger one to support the tax because of this joint enterprise feature." (R. 383.)

In *Southern Natural Gas Corp. vs. Alabama*, of course, the fact that the Southern Natural Gas Corporation did supply service lines was a controlling feature of the case. Thus Mr. Special Justice Fancher himself distinguished that case from the case at bar.

The joint enterprise feature which he mentioned has no connection with *Southern Natural Gas Corp. vs. Ala-*

bama. It was on this basis, however, that Mr. Special Justice Fancher rested his opinion. Not only did he say that "the case, as we view it, largely turns upon the contract between these two companies, and with the City" (R. 373), but when his opinion is analyzed it is clearly apparent that what he held was that Memphis Natural Gas Company was engaged in a partnership undertaking or a joint enterprise with Memphis Power & Light Company, which was a local distributor, and for this reason was engaged in intrastate business within the State of Tennessee.

Although this was his conclusion the only fact on which he relied was his construction of the contract, which he found to be a profit sharing arrangement. He concluded, therefore, as a matter of law that this profit sharing arrangement made the two companies joint entrepreneurs and therefore characterized the business of Memphis Natural Gas Company as intrastate business. (Majority Opinion of Supreme Court of Tenn., R. 371-383.)

Concurring Opinion of Mr. Justice McKinney.

Mr. Justice McKinney specially concurred but rested his opinion entirely upon the rule of *Southern Natural Gas Corp. vs. Alabama.* (R. 384-385.)

He concluded from the record that Memphis Natural Gas Company was engaged in servicing Tennessee customers and that this was determinative. In one respect his statement as to the record is incorrect, at least in its implications. He said that "in the instant cause, complainant piped the gas from Louisiana to Memphis, where, under one contract, a portion of it was turned

into a smaller pipe and delivered to the municipality for consumption at its electric generating plant." (R. 385.)

If by this statement was meant that Memphis Natural Gas Company ran a smaller pipe from its main line to the generating plant of Memphis Power & Light Company in order to supply that company with gas for consumption, it is incorrect. Memphis Natural Gas Company ran no pipe line from its main line to the generating plant of Memphis Power & Light Company. Memphis Power & Light Company tapped Memphis Natural Gas Company's main line at Brooks Avenue and from that point and via its Kansas Street station, Memphis Power & Light Company carried the gas to its generating plant, where it was consumed. (R. 188.)

This aside, however, Mr. Justice McKinney apparently found distribution in the fact that the main pipe lines of Memphis Natural Gas Company varied in their dimensions. The soundness of this finding we shall discuss in our argument. (Concurring Opinion of Mr. Jutice McKinney, R. 384-385.)

Dissenting Opinion of Mr. Justice Chambliss.

Mr. Justice Chambliss found "these Companies conceded to be legally distinct corporate entities." (R. 386.) He was of opinion that the contract between Memphis Power & Light Company and Memphis Natural Gas Company was in no sense a joint enterprise but a mere yardstick for determining the cost of gas.

He further found that the case was not ruled by *Southern Natural Gas Corp. vs. Alabama*, because "the 'distinction between the transportation of gas into a State

and the furnishing of gas to consumers within the State,' to quote the Alabama opinion, appears to have been preserved,—as it was not in that case." (R. 388.)

Opinion of Supreme Court of Tennessee On Petition To Rehear.

This opinion was concerned chiefly with making clear that the court has passed upon the constitutional question involved and explaining why no distinction was made between the gas delivered to West Tennessee Power & Light Company, with which concededly there was no joint undertaking, and that delivered to Memphis Power & Light Company. Mr. Justice Chambliss adhered to his dissent. (Opinion of Supreme Court of Tennessee on Petition to Rehear, R. 400-401.)

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

I.

Sections 1316, 1317 and 1318 of the Official Code of Tennessee of 1932 as construed and applied by the Supreme Court of Tennessee in this case are unconstitutional and in violation of Article I, Sec. 8, Clause 3, of the Constitution of the United States, in that as construed and applied by said court they exact of appellant an excise-privilege tax for the privilege of engaging in interstate commerce. This is I of appellant's Assignment of Errors accompanying Petition for Appeal to this Court. (R. 405-407.)

II.

In construing and applying Sections 1316, 1317 and 1318 of the Official Code of Tennessee of 1932, so as to exact an excise-privilege tax from the earnings of appel-

lant derived exclusively from interstate commerce, the Supreme Court of Tennessee deprived appellant of a right, privilege and immunity specially set up and claimed by it under the Constitution of the United States, said right, privilege and immunity being claimed under Article I, Sec. 8, Clause 3 of the Constitution of the United States, which delegates to Congress exclusive control of interstate commerce and prevents interference by a state with said interstate commerce by the imposition of a privilege tax or other direct burden on same. This is II of appellant's Assignment of Errors accompanying Petition for Appeal to this Court. (R. 407.)

III.

The Supreme Court of Tennessee erred in holding that under the contract between Memphis Natural Gas Company and Memphis Power & Light Company there was a joint enterprise or joint undertaking which took the business of Memphis Natural Gas Company in selling and transporting natural gas through its pipe line without the category of interstate commerce and stamped said sale and transportation by appellant with the characteristics of business done wholly within the state. This holding results in subjecting commerce that is wholly interstate to the excise-privilege tax imposed by Sections 1316, 1317 and 1318 of the Official Code of Tennessee of 1932, and in exacting of appellant a privilege tax for engaging in interstate commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States. This is III of appellant's Assignment of Errors accompanying Petition for Appeal to this Court. (R. 407-408.)

SUMMARY OF ARGUMENT.

The tax sought to be exacted of appellant has been definitively determined by the Supreme Court of Tennessee to be a privilege tax imposed on the actual doing of business within the State of Tennessee. (*Nature of Tax, infra*, p. 33.)

The business actually done by appellant was the interstate transportation of natural gas from the Louisiana fields through Arkansas, Mississippi and into Tennessee, where natural gas was sold to two public utility distributing companies and delivery made from the main pipe line system of appellant to the distribution systems of the utility customers. No distribution activity of any kind was carried on by appellant. All activities of appellant in Tennessee were incidental to the interstate transportation and sale of natural gas. All of the earnings of appellant in Tennessee were derived from such interstate transportation and sale.

It is the settled doctrine of this Court that under Article I, Section 8, Clause 3 of the Constitution of the United States a tax such as the Tennessee privilege tax cannot be imposed upon the business of a natural gas pipe line company whose activities are exclusively interstate. (*Appellant's Business During Tax Years Wholly Interstate and Not Subject to Tennessee Privilege Tax, infra*, p. 35.)

There is no merit in contentions, based upon considerations other than the method employed by appellant in transporting and delivering natural gas, urged to subject appellant to the tax:

(a) The contention that appellant's filing of its charter and maintaining an office in Tennessee subject it to the tax is without merit. (*Infra*, p. 47.)

(b) The contention that appellant and Memphis Power & Light Company were both members of the Electric Bond & Share Company system, and since concededly Memphis Power & Light Company was engaged in intrastate distribution of natural gas, therefore appellant was likewise, is without merit. (*Infra*, p. 52.)

(c) The contention that appellant must be construed as engaged in intrastate distribution of natural gas by reason of its contractual relationship with Memphis Power & Light Company, which is argued to have created, in effect, a joint enterprise, is without merit.

The contract was not a profit sharing arrangement but an arrangement for measuring prices charged by Memphis Natural Gas Company to the Memphis Power & Light Company and rates to be charged by Memphis Power & Light Company to its consumers.

Even if it had been a profit sharing arrangement, it could not have constituted the doing of business within the state of Tennessee by appellant.
(*Infra*, p. 54, et seq.)

(d) The contention that appellant might be constitutionally subjected to the tax imposed, even if it was engaged exclusively in interstate commerce, is without merit. (*Infra*, p. 65.)

ARGUMENT.

Nature of Tax.

The nature of the tax involved in this case is not a debatable question. It is a privilege tax. The privilege taxed is the doing of business in Tennessee. The Supreme Court of Tennessee has definitively decided both of these questions.

"Taxation of the privilege is upon the occupation or activity carried on amid the social, economic and industrial environment under protection of the state." • • • "The act imposes an excise tax, that is, a privilege tax, upon a class that embraces all domestic and foreign corporations or joint stock associations organized for profit and carrying on business within the State." • • • "Corporations or associations not doing business in the State and those that derive no net earnings from business are not subject to the tax whether they be foreign or domestic corporations." *Bank of Commerce & Trust Company vs. Senter*, 149 Tenn. 569, at 577 • • • 585.

The foregoing quotations clearly point out that the privilege taxed is the *doing* of business within the state and not the right or qualification to do business within the state. They also make it perfectly clear that the tax is not collectible from corporations "that derive no net earnings" from business within the state "whether they be foreign or domestic corporations."

In *Quicksafe Mfg. Corp. vs. Graham*, 161 Tenn. 46, a domesticated Delaware corporation, which succeeded a Tennessee corporation, was the owner of a patent right. It maintained an office in Tennessee, where it received

from a manufacturer royalties on machines manufactured in Connecticut and from there distributed. The Supreme Court of Tennessee, in holding that the corporation was not subject to the tax here involved, said:

> "The tax levied by this Act is *a privilege tax upon domestic and foreign corporations organized for profit and carrying on business in this state.*" (161 Tenn. 46, at 48.)

In the case at bar the Chancellor in his opinion lucidly pointed out the distinction between the authority to engage in business in Tennessee and actual doing of business, saying:

> "Many corporations have charters filed in the state of Tennessee under which they may be authorized to engage in a certain character of business, but do not do so, and the tax in this case is based upon the business *done* in the state of Tennessee as a matter of fact."
>
> (Opinion of Chancellor R. B. C. Howell, of Chancery Court of Davidson County, Tenn., R. 359-360. Emphasis as in opinion.)

This opinion thus sharply challenged the attention of the Supreme Court of Tennessee to the nature of the tax as defined by the lower court.

Moreover, the Supreme Court of Tennessee had before it the opinion of Assistant Attorney General Edwin F. Hunt, of Tennessee, which clearly defined the nature of the tax, in holding that the appellant was not liable for it:

> "The question does not arise as to whether the state could have included earnings from interstate commerce in the measure of the tax. Indeed such earnings may have been included under the constitu-

tion of the United States in the measure of tax of domestic corporations or of foreign corporations doing an intrastate business. However, since our statute explicitly excludes earnings arising from interstate commerce the only inquiry is whether the earnings of the Memphis Natural Gas Company in this State result from interstate commerce."

(Opinion, Assistant Attorney General, Edwin F. Hunt, Ex. "E," to Tes. Birger L. Johnson, R. 114, 575.)

The Supreme Court of Tennessee, by its silence in this case, accepted this definition as to the nature of the tax, as indeed it was necessary for it to do unless it desired expressly to overrule its prior decisions.

The nature of the tax being so clearly delineated, the issue here becomes sharply defined: Was appellant's busines during the tax years wholly interstate? If it was wholly interstate, can the tax imposed by the statute be collected for the privilege of doing this interstate business?

Appellant's Business During Tax Years Wholly Interstate and Not Subject to Tennessee Privilege Tax.

The record shows that all of appellant's earnings for the tax years were derived from its business of transporting natural gas and selling it at wholesale. If this business was wholly an interstate business, it follows that all of appellant's earnings were derived from an interstate business.

Appellant's operations during the tax years in question may be summarized:

It purchased natural gas in Louisiana; by means of its interstate pipe line it transported this gas through Louisiana, Arkansas, Mississippi and into Tennesee; under sales contracts which had been entered into in the state of New York this gas was delivered to appellant's two customers in Tennessee at City Gate Measuring Stations, pressure being reduced in order to effect delivery and the amount of gas delivered being metered; these two customers were public utility distributing companies. Appellant did not own or operate any local distributing pipe line; it had no control over the natural gas so transported after it left its main interstate gas pipe line and passed into the lines of the local public utility distributing companies. Appellant maintained an office in Memphis, Tennessee, wherein all the business done related exclusively to the operation and management of appellant's interstate pipe line operations in Arkansas, Louisiana, Mississippi and Tennessee. Memphis Power & Light Company received at the Memphis City Gate Meter Station from appellant's main gas pipe line gas in one bulk, part of which Memphis Power & Light Company conveyed in lines owned and controlled by it, to its generating plant for consumption, and part of which it used for local distribution to individual customers.

Delivery of comparatively small quantities of natural gas was made by appellant to Memphis Power & Light Company from appellant's main pipe line system, extending from Memphis to Jackson, Tennessee, at points in Shelby County, Tennessee, outside of the corporate limits of Memphis, from which points Memphis Power & Light Company served small communities in the county. Appellant made delivery from its main pipe line system

at seven City Gate stations outside of Shelby County, Tennessee, to West Tennessee Power & Light Company, for distribution by the latter company to as many municipalities located in West Tennessee.

In each instance of delivery appellant performed only such functions as were necessarily incidental to delivery and performed no distribution function whatsoever.

The operations thus summarized are identic with the operations of the Interstate Natural Gas Company in Mississippi, which were held, in the case of *State Tax Commission vs. Interstate Natural Gas Co.*, 284 U. S. 41, to be immune from the privilege tax which the State of Mississippi attempted to impose upon them. Mr. Justice Holmes in the opinion summarized the facts which were set out in an agreed statement:

> "The plaintiff has a trunk line of pipe extending from gas fields in Louisiana through Mississippi and back to Louisiana; 72.42 miles having a diameter of 22 inches, 8.11 miles having a diameter of 12 inches and 4.99 miles a diameter of 10 inches. It sells daily to distributors in Louisiana about 70,000,000 cubic feet of natural gas in summer and about 75,000,000 feet in winter. In Mississippi it sells as will be explained from 204,000 to 520,000 feet according to the season. The gas flows continuously from the gas fields in Louisiana and obviously, for much the greater part at least, in interstate commerce. But the appellants rely upon business done under two similar contracts made in New York to show that there was intrastate commerce in Mississippi that may be taxed without burdening the main activity that the State cannot touch.
>
> • • • •
>
> "Distributing companies tap the plaintiff's pipes near Natchez and the town of Woodville. *The gas*

withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail. (284 U. S. 41, at 43.)

It is to be noted that in the *Interstate case* there were present the same incidents of transportation of the gas that are here present—the measuring by a thermometer, the metering and the reduction of pressure. The record here shows that these are necessary incidents and that gas can not be transported in interstate commerce in any other way. (R. 50, 107.)

The *Interstate case* followed a long line of decisions by this Court which have established the principle that the transportation of oil or gas from one state to another is interstate commerce, and that it is beyond the power of a state to lay a tax on such interstate commerce in any form, whether on the transportation of subjects of commerce, or on the receipts derived therefrom, or the *occupation, or business, of carrying it on.*

East Ohio Gas Co. vs. Tax Commission, 283 U. S. 465;
Ozark Pipe Line Corp. vs. Monier, 266 U. S. 555;
Missouri, ex rel Barrett vs. Kansas Natural Gas Company, 265 U. S. 298;
Pennsylvania vs. West Virginia, 262 U. S. 553;

Eureka Pipe Line Company vs. Hallanan, 257 U. S. 265;
Public Utilities Commission of Kansas vs. Landon, 249 U. S. 236.

As was said by this Court in *Public Utilities Commission of Kansas vs. Landon*, 249 U. S. 236, "that the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted." (249 U. S. at 245.) The Court in that case fixed the time when this interstate commerce terminated when it said: "Interstate movement ended when the gas passed into local mains." (249 U. S. at 245.)

Applying this test to the case at bar, when the gas moved out of the main trunk pipe line of Memphis Natural Gas Company into the local distributing lines of Memphis Power & Light Company and of West Tennessee Power & Light Company at the various points of delivery located on appellant's main pipe line system the operation of Memphis Natural Gas Company and the business done in regard to the transportation and delivery of said gas was at an end. The interstate movement of the gas had terminated. Likewise the business and operation of the appellant had ceased.

There is no suggestion in the instant case that the appellant transported natural gas to the burner tips of any local consumer. The uncontradicted proof clearly shows that appellant did not own or operate any pipe lines, facilities, or instrumentalities of any character which were or could be used in connection with the distribution of gas to any local consumer in the State of Tennessee.

If such distribution activity had been carried on, admittedly there would have been intrastate commerce; for in *East Ohio Gas Co. vs. Tax Commission*, 283 U. S. 465, it was held that when a distributing company carried the gas to the burner tips of numerous household consumers this was an intrastate business notwithstanding the fact that the gas had come from without the state.

Southern Natural Gas Corporation vs. Alabama, 301 U. S. 148, is a case where, as to the business held subject to tax, this Court found present elements of local distribution. The contract between the gas corporation and the Tennessee Coal, Iron and Railroad Company provided for the establishment by the Gas Corporation of service lines and the record shows that such lines were established to handle distribution of the gas to various industrial plants of the purchasing company.

The Court, therefore, found that the situation was essentially similar to that which existed in *East Ohio Gas Co. vs. Tax Commission*, 283 U. S. 465, in which case East Ohio Gas Company maintained, owned and operated a municipal distribution system.

The decision is rested entirely upon the similarity between servicing many different plants by service lines and servicing many different individual consumers by means of a distribution system. So essentially was the gas company in the *Southern Natural Gas Corporation case* engaged in distribution that it not only delivered the gas by service line to many widely separated plants, but delivered it "at a pressure of not less than thirty pounds gauge at some mutually satisfactory location or

locations upon the premises of buyer." (301 U. S. 148, at 152.)

In the case at bar Memphis Natural Gas Company had not a single service line, it transported no gas to the premises of Memphis Power & Light Company or West Tennessee Power & Light Company, but these companies merely tapped the main pipe line system of Memphis Natural Gas Company.

Again we point out that the reduction of pressure made at the delivery points by Memphis Natural Gas Company was merely sufficient to enable delivery to be made into the lines of the distributing companies and was, therefore, entirely incidental to this delivery. This court did not overlook this fact in the *Southern Natural Gas Corporation case.* It pointed out that the servicing and distribution in that case distinguished it from *Ozark Pipe Line Corporation vs. Monier,* 266 U. S. 555, and *State Tax Commission vs. Interstate Natural Gas Company,* 284 U. S. 41, because in those two cases all things done within the state where the gas was delivered were, as in the case at bar, merely incidental to interstate commerce.

That the reduction of pressure in the case at bar was purely incidental to interstate commerce and only such as was necessary in order to effectuate delivery, is demonstrated by the fact that after Memphis Power & Light Company took possession and control of the gas, it was necessary for it still further and greatly to reduce its pressure before it could either use it or distribute it.

At Brooks Avenue Memphis Natural Gas Company delivered to Memphis Power & Light Company, in bulk,

almost all the gas bought by Memphis Power & Light Company. Only a small percentage for distribution by Memphis Power & Light Company to small Shelby County communities was delivered at other points where Memphis Power & Light Company tapped complainant's main pipe line system. Delivery at Brooks Avenue was made by Memphis Power & Light Company tapping at that point the main line of Memphis Natural Gas Company with one pipe. From the Brooks Avenue station Memphis Power & Light Company, in a pipe owned and controlled by it, took the gas to Kansas Avenue in Memphis. From that point Memphis Power & Light Company had branching pipes and in them carried some of the gas to its power plant where it was consumed as fuel, and the remainder of the gas was turned into channels for consumption by the public. Thus, according to the undisputed facts, Memphis Power & Light Company merely tapped the main line of Memphis Natural Gas Company and all separating, distributing and servicing was done by Memphis Power & Light Company.

The same was true at every other point where either Memphis Power & Light Company or West Tennessee Power & Light Company obtained gas. In each instance the main interstate pipe line system of Memphis Natural Gas Company was tapped and Memphis Natural Gas Company did nothing more than reduce the pressure and measure the gas incidental to its delivery.

In ascertaining whether or not a pipe line company is engaged in distributing gas the determinative test is not whether the gas is consumed by the one who receives it from the pipe line company but what is done by the pipe line company in the way of distribution. There might

be many ultimate consumers of the gas and yet no distribution by the pipe line company. On the other hand there might be one consumer of the gas which had many plants and still be distribution by the pipe line company. Mr. Justice McKinney, in his Concurring Opinion, comments upon the varying sizes of the pipe line. Not all of appellant's main line pipe lines were of the same size. The exact facts are shown by the Map, Exhibit "A" to the testimony of Henry C. Wallace, and by Exhibit "B" to the testimony of the same witness. (R. 35-36, 33, 460A; 36, 461.)

In each instance, however, these were main pipe lines and not one of them was or had any attribute of a service line. They were not used for distribution but as main lines. The pressure on them was not that of a service line but the pressure necessary to transport gas in a main pipe line, varying between 400 pounds and 100 pounds per inch, and never less than 100 pounds, for delivery to the Memphis City Gate. (R. 42, 49, 158.)

Distribution required further and drastic reduction of pressure by the distributing companies. It would have been impossible to permit the natural gas to travel through a distribution system at the high delivery pressures. (R. 50, 87, 125.)

Such an extreme reduction of pressure was necessarily made by Memphis Power & Light Company before the natural gas received by it from appellant was used by consumers that frequently when the gas jet was turned on in the home of the consumer, the pressure was as low as one-half pound per inch. (R. 156, 188.)

Nowhere in the *Southern Natural Gas Corporation case* does this Court mention as a basis for its decision the fact that the Tennessee company consumed the gas instead of distributing it. The characteristic of intrastate business was found in servicing and distribution and not in consumption by the Tennessee company.

We put an illustration:

An individual owns a large subdivision in one state. Title to all the dwelling houses in the subdivision are in him and under his contract with his tenants he agrees to furnish them natural gas for heating the houses. This natural gas is brought to the subdivision from another state in interstate commerce. If the owner of the subdivision taps the main pipe line and distributes the gas to his tenants the pipe line company is engaged in interstate commerce. If the pipe line company not only transports the gas in interstate commerce, but runs service lines through the streets of the subdivision to each house and thus services the gas, this is intrastate commerce.

The distinction is perfectly apparent. It rests not upon whether the purchaser is the consumer, but upon whether the transporter is the distributor. The distinction between transportation and distribution of gas is well recognized and these terms have a well defined meaning.

Mr. Justice Butler, in *East Ohio Gas Co. vs. Tax Commission of Ohio,* supra, accurately described what constitutes distribution of gas when he said:

> "But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the

high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."

(283 U. S. 465, at 470, 471.)

In the case at bar, however, Memphis Natural Gas Company had absolutely nothing to do with the gas after it left its "high pressure interstate transmission lines." Appellant did not divide the gas "into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises," nor did appellant subdivide the gas so that it might enter the service line that led to Memphis Power & Light Company power plant, there to be consumed as fuel. Memphis Natural Gas Company delivered only the "original package" at the Brooks Avenue station and elsewhere. These packages were broken and distributed not by appellant, but by Memphis Power & Light Company and West Tennessee Power & Light Company. It is entirely fallacious to insist that the mere fact that any commodity passing in interstate commerce is consumed by the one to whom it is delivered instead of being resold in any respect alters the interstate nature of the delivery.

Cf. *Brennan vs. City of Titusville*, 153 U. S. 289;
Best & Company, Inc., vs. A. J. Maxwell, 311 U. S. 454.

In analyzing the opinions of the Supreme Court of Tennessee we have already pointed out that Mr. Special Justice Fancher did say without specification that when "it (the gas) is sold to consumers by distribution or upon orders on demand, considering all its activities, it is intrastate business" (R. 382), adding however that the distinction between the instant case and the Southern Natural Gas Corporation was that in the case at bar there were no service lines as there were to the Tennessee company. He thus leaves uncertain wherein he found distribution.

Mr. Justice McKinney, in his concurring opinion, is at least more specific, for he found distribution in the fact that the main pipe lines of Memphis Natural Gas Company in the State of Tennessee varied in their diameter, apparently being of opinion that this converted them into service lines.

We fail to follow this reasoning, especially in view of *State Tax Commission vs. Interstate Natural Gas Company*, 284 U. S. 41, a case where interstate transportation was carried on in pipe lines with diameters of 22, 12 and 10 inches, respectively. It is entirely immaterial that there should be a variance in the sizes of the pipe lines as long as they are main pipe lines and not service or distribution lines. Function of the pipe lines, not size, is the criterion. Appellant's pipe lines, regardless of size, were all main transportation lines, not distribution or service lines.

Our submission therefore is that in delivering and transporting this gas, Memphis Natural Gas Company was engaged in interstate commerce and that all things

done in connection therewith, such as maintaining the pipe lines, metering the gas and reducing the pressure, were done purely as incidents to this interstate commerce. That this was the true situation as reflected by the record is clearly set out in the Dissenting Opinion of Mr. Justice Chambliss. (R. 385-389.)

The entire earnings on which it is sought to lay the excise-privilege tax were derived from this interstate transportation and sale.

It is apparent therefore that if any intrastate business is to be found, it must be found in something other than the method of transporting and delivering the gas. The attempt is made to find it in the fact that appellant maintained an office in Tennessee.

Claim That Appellant's Filing of Its Charter and Maintaining an Office in Tennessee Subject It to the Tax.

None of the opinions of the Supreme Court of Tennessee was specifically based upon the fact that appellant had filed its charter and did maintain an office in Tennessee during the tax years in question, although this fact was mentioned by the Majority Opinion. (Majority Opinion, Supreme Court of Tennessee, R. 372-373.)

The testimony shows without dispute that during the tax years in question neither the Memphis office nor the company, itself, transacted any business whatever except that which related to the transportation of gas in interstate commerce. Moreover, during these years its entire income was derived from the aggregate amounts paid under their contracts by Louisiana Power & Light Com-

pany, Arkansas Power & Light Company, Mississippi Power & Light Company, Memphis Power & Light Company and West Tennessee Power & Light Company.

The Chancellor found:

> "The complainant maintains an office in Memphis, Tennessee, and the business transacted at this office during the years in question was exclusively the operation and management of the company's pipe line referred to." (R. 359.)

There did exist in Tennessee a tax or fee for the filing of appellant's charter in Tennessee and that tax was paid initially and annually after the filing of the charter. It was $150.00 per year. (R. 204.)

This Court has never held—as far as we can find—that the mere filing of a charter in a state and the maintaining of an office in that state purely incidental to the transaction of interstate business by a foreign corporation amounted to the doing of an intrastate business. *Ozark Pipe Line Company v. Monier*, 266 U. S. 555, is precisely to the opposite effect. The Court found "nor is it material that appellant applied for and received a Missouri license or that it had the power thereunder to exercise the right of eminent domain." (266 U. S. 555, at 567.)

That case in discussing the maintenance of a Missouri office by the pipe line company reaffirmed the rule adopted in *Heyman vs. Hays*, 236 U. S. 178, which involved facts closely paralleling what was done by the Tennessee office of Memphis Natural Gas Company.

The *Ozark Pipe Line case* was approved in *Anglo-Chilean Nitrate Sales Corporation vs. Alabama*, 288 U. S. 218. There the corporation had filed its charter in Alabama and thus become authorized to do business in that state, but had actually transacted only interstate business. This Court found the authorization not to amount to intrastate business, supporting the imposition of a franchise tax, saying, "The fact that appellant qualified to do business in Alabama was not, and rightfully can not be, held to sustain the tax." (288 U. S. 218, at 224.)

Nothing is found in the opinion in *Southern Natural Gas Corporation vs. Alabama*, 301 U. S. 148, which in any wise impinges upon the authority of *Ozark Pipe Line Company vs. Monier, supra.*

The Court in the *Southern Natural Gas Corporation case* did comment upon the fact that the gas company did have an Alabama office. The discussion immediately followed the determination of the Court as to the nature of the statute, which determination concluded with the following sentence: "By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized." (301 U. S. 148, at 153.) Immediately thereafter, as if to point out that the gas company had to some extent at least availed itself of this privilege, followed the statement as to the maintenance of an office in Alabama.

That the Court found significant the maintenance of this office primarily as it related to the kind of tax involved in that case is we think demonstrated by the fact that *Stone vs. Interstate Natural Gas Co.*, 103 Fed. (2d) 544 (C.C.A. 5th) Aff'd, 308 U. S. 522, which involved a

case where it was held this kind of tax was enforceable notwithstanding the fact that the business of the gas company was concededly interstate, was affirmed on the authority of the *Southern Natural Gas Corporation case.*

When Mr. Chief Justice Hughes, in the *Southern Natural Gas Corporation case,* did come to discuss *Ozark Pipe Line Company vs. Monier,* he distinguished it from the case he was deciding on the ground that "nothing was done in Missouri except in furtherance of transportation. Oil was neither received nor delivered in that State. The business actually carried on 'was exclusively in interstate commerce' and whatever was done within Missouri in maintenance of an office or otherwise was 'all exclusively in furtherance of its interstate business.'" (301 U. S. 148, at 155.)

The effect of this, of course, was to reaffirm the authority of *Ozark Pipe Line Company vs. Monier.* So far as the maintenance of the Alabama office was in the *Southern Natural Gas Corporation case* related to intrastate business, it did not effect a metamorphosis by which interstate business became intrastate business, but merely increased the amount of intrastate business which was created by the distribution. In that case the distribution of natural gas was the foundation of intrastate business and the office business *which related to that local distribution* was merely the super structure on that foundation.

The situation is greatly clarified by the dissenting opinion of Mr. Justice Cardozo in *Anglo-Chilean Nitrate Sales Corp. vs. Alabama,* 288 U. S. 218. Mr. Justice Car-

dozo dissented in that case on the ground that the Alabama courts had already held (as this Court in the *Southern Natural Gas case* found they had later held) the statute in question to impose a tax on the privilege of doing business in Alabama, regardless of whether business was done. Being of this opinion he had this to say about the fact that in *Ozark Pipe Line Company vs. Monier, supra,* the gas company filed its charter in Missouri and there maintained an office:

> "This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state."
>
> (288 U. S. 218, at 236.)

Accepting this analysis it becomes manifest that in this case the privilege of interstate transportation of natural gas was "an emanation from the federal power," so all things incidental thereto were "an emanation from the federal power," including not only the reduction of pressure, metering, and maintenance of the pipe line, but maintenance of the Tennessee office.

The right to do a local business in Tennessee was "a franchise emanating from the power of the state." The tax, however, is not laid upon this franchise, and it is not here involved. Therefore the maintenance of the Tennessee office is not determinative one way or the other. If the appellant was engaged solely in the interstate transportation of natural gas, the work of that office was entirely incidental thereto. If on the other

hand appellant was engaged in distributing natural gas in Tennessee, then part of the work of the Tennessee office necessarily related to that distribution. If otherwise intrastate business was not done in Tennessee the maintenance of the Tennessee office does not alter this fact. If otherwise intrastate business was done in Tennessee, then the maintenance of the Tennessee office might increase that business because part of it would necessarily relate thereto.

Claim That Appellant Part of Integrated Electric Bond & Share Company System and Claim of Joint Enterprise.

Pressed both in the Chancery Court and in the Supreme Court of Tennessee by the appellees was the contention that Memphis Natural Gas Company was an integral part of Electric Bond & Share Company system and under its domination and control, and so, as it was insisted, was Memphis Power & Light Company. Therefore it was argued that inasmuch as Memphis Power & Light Company was concededly engaged in the local distribution of gas in Tennessee, Memphis Natural Gas Company as its *alter ego* was so engaged.

In connection with this insistence it was urged that in some instances, even though there was not the ownership of a majority of stock, there might be such inter-connection between two corporations that they became in effect a single entity. *United States vs. Union Pacific R. Co.*, 226 U. S. 61, a case where there was an ownership of 46% of the stock and actual domination under the facts, was relied on.

In the case at bar not only was there no testimony tending to show such domination but the uncontradicted evidence was to the contrary.

In our Statement of the Case (supra, p. 18) we have fully set out the facts, which show that there was no control of Memphis Natural Gas Company, Memphis Power & Light Company or Electric Bond & Share Company or any of its affiliates. We have also shown that in fact Memphis Natural Gas Company was dominated by Commonwealth Gas Corporation which had no connection of any kind with Electric Bond & Share Company or any one of its subsidiaries. It is unnecessary either to restate these facts or to argue them. This is true because both the Chancery Court and the Supreme Court of Tennessee affirmatively found against this contention.

The Chancellor in his opinion dealt with this insistence of the appellees in the following language:

> "It is also insisted by the defendants that the complainant company is an integral part of the Electric Bond and Share group of corporations and so interlocked with the corporation in Louisiana from which it purchases its gas, and the corporate purchasers from it in Tennessee, that they are component parts of the same enterprise and therefore liable for the tax. After a careful examination of all the proof and the entire record, the Court is of opinion that this contention of the defendants is not established. The Electric Bond and Share group of corporations do not dominate and control the complainant corporation and the complainant's dealings with the distributing companies has been by contract entered into after much discussion and some delay, which constitute these distributing corporations buyers of gas from the complainant company in the

ordinary course of trade, and not by reason of any dominating influence of a holding company."
(R. 360.)

Mr. Special Justice Fancher, in delivering the Majority Opinion of the Supreme Court of Tennessee, accepted this finding of the Chancellor:

> "There seems to be separate corporate entity, as was found by the Chancellor. This does not preclude a conclusion that these gas companies acted in concert and each was a party to and interested by contract in the operations, profits and/or losses of the other and that the whole business is so intertwined as to make their business joint."
> (R. 380.)

This contention being thus disallowed by the Tennessee courts, we pass to consideration of the basis upon which, as we have already pointed out, the Majority Opinion of the Supreme Court of Tennessee was primarily rested—that is, that when the contract between Memphis Natural Gas Company and Memphis Power & Light Company is considered "the whole business is so intertwined as to make the business joint." (R. 380.)

Though not abundantly clear, under careful scrutiny, however, it emerges that Mr. Special Justice Fancher was of opinion that the case "largely turns upon the contract between these two companies and with the City." (R. 373.)

In treating of this he held that the contract was a profit sharing contract and then assumed that if it was a profit sharing contract the effect of it was to convict Memphis Natural Gas Company of doing an intrastate business.

While he did in the course of his opinion refer to a joint undertaking, it is apparent from the connection in which this expression was used that he had always in mind profit sharing.

In regard to the inception of the arrangement, he stated that "these two corporations cooperated jointly in the scheme of bringing natural gas into Memphis and distributing it to the consuming public." (R. 373.)

The facts which we have set out (supra, p. 16) disclose that instead of there being any such joint undertaking in the beginning, what actually happened was that those who promoted Memphis Natural Gas Company conceived the idea of an interstate gas pipe line from the gas fields to Memphis, and with the aid of the City forced Memphis Power & Light Company to become a reluctant distributor of this gas. There was no common thought or common purpose between the two companies, but the entire idea was that of Memphis Natural Gas Company, and Memphis Power & Light Company became a distributor not because it desired to further that purpose but in order to escape the threat of competition.

The confusion of thought in the Majority Opinion which fails to distinguish between profit sharing and a joint enterprise is disclosed by the statement that "even without joint control of the operations that produce profits, persons or corporations may establish relationships that will result in a sharing of profits, each with the other. There is no law against two public utilities engaged in supplying gas to a community to so divide or parcel their work as to give each a separate manage-

ment of a portion and then pool their earnings, regardless of the technical rules of partnership. The right to contract is free enough to include such an arrangement, and there is no vice in it." (R. 374.)

And in another portion of the opinion it was said that: "The entire set-up and the whole contract between the two companies and the public shows a joint understanding." (R. 378.)

Naturally there was a joint understanding, otherwise there would have been no meeting of the minds and no contract. Again it is said that "in reality there was an operation in which both companies were jointly interested. There was an allotment of work performed but a division of the entire results of that work." (R. 379.)

The reading of the entire opinion will disclose what these quotations illustrate, that Mr. Special Justice Fancher believed that the contract amounted to the sharing of profits and assumed that if this was true, then necessarily Memphis Natural Gas Company was engaged in intrastate commerce because the Memphis Power & Light Company was so engaged. We shall endeavor to point out that neither the belief nor the assumption is justified.

The contract between Memphis Natural Gas Company and Memphis Power & Light Company was not a typical profit sharing arrangement nor was it, in the true sense of that term, a profit sharing contract. It was a sales contract with certain provisions for adjustments of the prices for which the commodity—natural gas—was sold. This is demonstrable by an examination of the contract.

Article Sixth began:

> "SIXTH. Subject to adjustment in accordance with the provisions of Article Eleventh hereof, the Buyer shall pay the Seller monthly for gas purchased hereunder during the preceding calendar month at the following rates:"
>
> (Ex. "A," Tes. Birger L. Johnson, R. 103, 515.)

The remainder of this article listed the charges made for the gas, these being dependent upon the uses to which the gas was put by Memphis Power & Light Company, with a catch-all provision covering unaccounted for gas. (*Ibid*, R. 515.)

Here, as elsewhere, the contract appropriately used the terms "Buyer" and "Seller" and referred to gas "purchased." The "adjustment" referred to was an adjustment of the sales prices.

Article Ninth provided for the furnishing of a statement by "the Seller"—Memphis Natural Gas Company—to "the Buyer"—Memphis Power & Light Company "and to the City of Memphis," the first paragraph of that article being:

> "NINTH. Within three months after the expiration of the first and each successive year after the date on which the Seller begins to deliver natural gas to the Buyer hereunder (each such first and successive year being herein sometimes referred to as a 'contract year'), the Seller shall deliver to the Buyer and to the City of Memphis, a statement setting forth in reasonable detail:" (*Ibid*, R. 517.)

This statement was to contain: (1) the amount of the Seller's investment which was arrived at by adding to

an agreed amount additional investments; (2) the gross revenues under the base prices of the Seller which consisted of the amount paid by the buyer to the Seller for natural gas; (3) costs to the Seller of maintaining and operating its pipe line; (4) amounts necessary for reserves for renewals and replacements or extraordinary maintenance not covered by (3); (5) amount necessary to amortize the Seller's investment; (6) taxes; (7) 6 per cent return on Seller's investment and (8) the net "surplus" or "deficit" of the Seller for the contract year, these to be arrived at by subtracting from the gross revenues (2) the aggregate of the amount provided for in (3), (4), (5), (6) and (7).

Article Tenth provided for a statement to be furnished by the Buyer "to the Seller and to the City of Memphis." This statement was not to be identical with the statement to be furnished by the Seller—Memphis Natural Gas Company, to the Buyer—Memphis Power & Light Company, but it was specifically provided that it should contain: (1) the Buyer's investment, arrived at by adding to an agreed initial amount *additions* to its natural gas distribution system; (2) gross revenues of the Buyer from the Seller of natural gas during the contract year; (3) cost of maintaining and operating its natural gas distribution system; (4) sums necessary to maintain reserves necessary for renewals, replacements or extraordinary maintenance; (5) amount necessary to amortize any additions to its original investment made by the Buyer for expanding its natural gas distribution system, but *not including any provision for the amortization*

of the Buyer's original investment for distribution[a]; (6) taxes; (7) 6 per cent return on the Buyer's investment and (8) "the net surplus or net deficit of the Buyer for such contract year as determined by subtracting from the gross revenues set out in (2) above, the sum of the amounts set out in (3), (4), (5), (6) and (7), above."
(*Ibid*, R. 522.)

These so-called net "surpluses" and net "deficits" which were later dealt with under Article Eleventh of the contract were not in the ordinary sense profits or losses, such as are distributed or liquidated under a partnership arrangement. They were amounts arrived at by definite artificial formulae agreed upon by the parties. Moreover, the "surpluses" or "deficits" of the "Seller" —Memphis Natural Gas Company—and of the "Buyer" —Memphis Power & Light Company were arrived at in distinct and differing ways. The purpose of this provision becomes apparent when Article Eleventh of the contract is considered. True, under this article the artificially created surpluses or deficits were to be divided between the parties, but this was merely the first step to the real re-arrangement or adjustment provided for by that article.

Not subsequent to this preliminary step, but "*at the same time*, the parties shall agree upon such adjustments, if any, in the rates set forth in Article Sixth hereof as may be calculated to be necessary in order as nearly as

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[a]In this respect the statements to be furnished by the Seller and by the Buyer are diametrically different. This is true notwithstanding the following statement in the Majority Opinion: "By the Tenth Article, Buyer was to deliver, yearly, to Seller and to the City of Memphis, the same information of its affairs and operations as those required of Seller, listed above." (R. 375.)

possible to effect an equal division of any contemplated combined surplus and/or deficit for the contract year then current and for subsequent contract years." (*Ibid*, R. 522.)

In other words, at the time the check passed the prices under Article Sixth were to be adjusted so that as far as possible the future passing of checks would be obviated.

The contract further provided that after the "deficits" of both parties were made up, that is after they had received repayment for all of the charges provided for in the contract and the 6 per cent return, and the Buyer—Memphis Power & Light Company—had received in addition 1½ per cent per annum, thus making its total return 7½ per cent per annum, the balance should be either paid to or retained by Memphis Natural Gas Company. This was to continue without any further changes of the prices set out in Article Sixth until Memphis Natural Gas Company had received, in addition to its 6 per cent on its investment "a reasonable return in view of the hazards of the undertaking."

When this balance exceeded an amount sufficient to compensate Memphis Natural Gas Company for the hazards of the undertaking the excess above this was to be used for the reduction of rates. This was to be done by reducing the prices provided for in Article Sixth by an amount comparable to the excess above the returns thus allowed to Memphis Power & Light Company and Memphis Natural Gas Company, that is, 7½ per cent to Memphis Power & Light Company and 6 per cent

plus an additional reasonable return to Memphis Natural Gas Company. This reduction of prices provided for under Article Sixth necessarily, of course, would have reduced the operating expenses of Memphis Power & Light Company because it would have reduced the aggregate amount that would be paid by that company for its gas. This reduction was to be passed on to the consumers by Memphis Power & Light Company by a rate reduction accorded them. This, of course, was the interest of the City in the contract. (*Ibid*, R. 522-524.)

This analysis of the contract, especially when set against the background and seen in the light of the conditions under which it was entered into, clearly shows its purpose. The parties to the contract were confronted with what to them was a novel situation. Memphis Natural Gas Company had never before engaged in transportation of natural gas. Memphis Power & Light Company had never distributed natural gas. The sale prices for natural gas were, therefore, necessarily experimental. Only by experience could it be determined what prices would be fair and reasonable to each company. The adjustments, therefore, were used as a yardstick to measure fair prices during the life of the contract because they were incapable of ascertainment at the time the contract was executed. This, and not any profit sharing, was the purpose of the provisions to which we have referred.

This view is, of course, strengthened by the attitude of the City toward, and its interest in, the contract. That interest was to secure natural gas for the citizens of Memphis at the lowest price commensurate with a fair

return to Memphis Natural Gas Company and Memphis Power & Light Company. This, too, was experimental and therefore these rates also were subject to adjustment should the return prove sufficient to permit of their reduction.

It, of course, will not be suggested that in respect to the prices to the consumer these provisions of the contract were anything more than a measuring rod. But if a measuring rod in regard to the rates to be charged the consumer, they were equally a measuring rod of prices to be charged by Memphis Natural Gas Company to Memphis Power & Light Company.

Entirely absent both from the record and from all opinions of the Supreme Court of Tennessee is any suggestion that there was any joint control by Memphis Power & Light Company and Memphis Natural Gas Company of the intrastate business done by Memphis Power & Light Company. On the contrary not only does the evidence without contradiction negative any such idea but all of the opinions of the court accept this. Although this is true, it is our submission that even if there had been joint control, it would we think, be fairly debatable as to whether this would justify the finding that Memphis Natural Gas Company was doing an intrastate business in Tennessee, so long as the separate corporate entities were preserved and were not part of an integrated system. Absent this, it seems clear that so far as the question of whether Memphis Natural Gas Company was engaged in intrastate business is concerned, it is entirely immaterial whether this was a profit sharing arrangement.

Mr. Justice Chambliss in his Dissenting Opinion accepted the illustration we brought to the attention of the court and added one of his own, saying:

> "I think the illustration suggested on the brief of counsel for the Natural Gas Company of the modernly common landlord and tenant lease contracts presents an apt analogy, the rental being based on the volume of business and incidental profits of the tenant. Here is a profit sharing compensation plan of fixing compensation, but the independence of the status of the parties is otherwise maintained, and the taxes, or other obligations of the parties, are not affected. Another simple illustration: A, a seller, in Dakota, contracts with B, a Tennessee buyer, to sell and ship wheat in such volume as the buyer may require through a given season. The price to be paid A is based on a fixed minimum sum per bushel, plus fifty percent of any excess realized by the buyer from his sales of the wheat: Does this profit sharing arrangement defeat the interstate commerce immunity of the interstate shipment? I think not."
>
> (R. 387.)

The fallacy in the assumption that profit sharing would have any such effect as Mr. Justice Fancher gave it can we believe be demonstrated. Suppose Memphis Power & Light Company had constructed a pipe line from Memphis, Tennessee, to the Monroe, Louisiana, gas fields, and that it had purchased gas from a producer in that field, a supposititious company, Louisiana Gas Producing Company. Natural gas was placed in this pipe line and transported to Memphis, there to be distributed by Memphis Power & Light Company. The contract between Memphis Power & Light Company and Louisiana Gas Producing Company as to the distribution of the so-called profits, we will assume, was substantially the same

as that between Memphis Power & Light Company and Memphis Natural Gas Company. Louisiana Gas Producing Company, however, had no pipe line in the State of Tennessee, had not qualified to do business in that state and had no connection with that state or any corporation which did do business within it, other than its contract with Memphis Power & Light Company. There was no stockholder who owned stock in both Memphis Power & Light Company and Louisiana Gas Producing Company. Under these circumstances it would, we submit, be absurd to argue that Louisiana Gas Producing Company was doing intrastate business in Tennessee. Yet if Mr. Special Justice Fancher was right in saying that Memphis Natural Gas Company was doing an intrastate business in Tennessee because of its contract with Memphis Power & Light Co., it would necessarily follow that Louisiana Gas Producing Co. in the illustration we have supposed would also be doing intrastate business in Tennessee.

So far as we have been able to find the only authority dealing with this question is furnished by the opinion of the Court of Appeals of New York in *People ex rel Pennsylvania Gas Company vs. Saxe, et al.*, 229 N. Y. 446, 128 N. E. 673, in which the court dealt with a similar arrangement between an interstate gas pipe line company and local gas distributing companies. In that case the amounts to be paid by the distributing companies to the pipe line company were based upon the gross receipts from distributors. The contracts were requirement contracts. The result was that the pipe line company which transported the gas in interstate commerce received from the distributors which distributed locally "from 80 to

86⅔ per cent of the gross receipts," the distributors "retaining the residue for themselves." Judge Cardozo (later Mr. Justice Cardozo of this Court) speaking for the New York Court, said:

> "We think the interstate character of the relator's (pipe line company's) business is untouched by these arrangements." (128 N. E. at 674.)

He further said that "the sale does not cease to be one in interstate commerce because the price is to be measured by the purchaser's receipts." (*Ibid.*)

Regardless of whether the contract between Memphis Power & Light Company and Memphis Natural Gas Company had the effect of a profit sharing or a quasi profit sharing arrangement, the result was not that found by Mr. Special Justice Fancher and this arrangement did not, as he held, prove that Memphis Natural Gas Company was doing intrastate business in the State of Tennessee. This being true the primary foundation upon which he places his conclusion is destroyed.

Contention That Tax May Be Sustained Even If Memphis Natural Gas Company Was Engaged Exclusively In Interstate Commerce.

In the Supreme Court of Tennessee it was insisted, in a belated reply brief filed on behalf of the Attorney General of Tennessee, that the decision in *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U. S. 33, was a departure from the well settled rule established by this Court that the privilege of doing interstate commerce cannot be taxed by means of an excise tax. The Supreme Court of Tennessee did not sanction this contention in any of the opinions delivered.

Without attempting to place the *Berwind-White case* exactly in its setting and without embarking upon a review of the decisions of the Court prior to that case—for we feel that such an attempt and such a review would unduly prolong the length of this brief and are unnecessary to a decision of this case—we point out that in our case there is present no one of the elements which were determinative in sustaining the tax in the Berwind-White case: there is here no tax upon a purchaser, no tax upon the transfer of title or possession, no tax that might be assimilated to a tax upon storage or use of property in the State of Tennessee. Here is a tax which amounts to one upon the privilege of engaging in interstate commerce, a tax implicitly condemned by the Berwind-White case itself.

Our submission is that the *Berwind-White case* is no extension of previous cases except that it holds that a sales tax may be imposed notwithstanding the fact that the sale was made pursuant to a prior contract to bring the goods from without to within the state. This distinction aside, it is entirely analogous to the use tax. The use tax, property tax or sales tax may be imposed upon property that formerly flowed in interstate commerce, after the end of the journey, and when it has become a mass of the property in the state.

This being the *sine qua non*, such taxes can not be imposed upon the vendor because his connection with the property within the taxing state is only that of a deliverer. The *Berwind-White case* thus viewed does not impinge upon the prior condemnation of excise taxes on

*See Powell—"New Light on Gross Receipts Taxes: The Berwind-White Case." 53 Harvard Law Review, p. 909.

the privilege of doing interstate commerce, or of taxes on interstate transportation.

This is a necessary conclusion because the right to engage in interstate commerce emanates from the federal power and not from the state power. The state possesses no authority therefore to impose a tax upon a privilege which it does not grant and cannot control but which flows entirely from the federal power.

CONCLUSION.

The conclusions we draw are these:

The taxing statute involved has been definitively construed by the Supreme Court of Tennessee as imposing a privilege tax. If it is applied, as it is sought to be applied by the taxing authorities of Tennessee, so as to reach the earnings of appellant, then it becomes a privilege tax upon the doing of interstate commerce. This is true because the entire earnings of appellant sought to be taxed were derived from interstate commerce. This commerce consisted during the tax years in question in the transportation and sale of natural gas. All other business of appellant, including the maintenance of an office in Tenneseee, was merely incidental to this business. There was no distribution of natural gas by the appellant within the State of Tennessee, and all its pipe lines in that state were main pipe lines. Appellant's business lost none of the characteristics of interstate commerce because of any corporate relationship with any corporation doing business within the State of Tennessee, because it was a distinct and separately controlled corporate entity. Nor did the contract between Memphis Natural Gas Company and Memphis Power & Light Company have this effect. The provision for adjust-

ments properly considered was a yardstick for rates. But even if considered as a profit sharing arrangement, the fact that Memphis Natural Gas Company may have received part of the profits of Memphis Power & Light Company does not in any sense mean that Memphis Natural Gas Company did an intrastate business within Tennessee. Properly viewed, therefore, the tax remains a typical privilege tax upon interstate commerce and thus seeks to tax a privilege which emanates from federal and not from state power and for this reason is to be condemned.

If these conclusions are approved by the Court, procedural questions become unimportant. The statute having been construed and applied to appellant's business is invalid under, and appellant has been deprived of a right, privilege and immunity guaranteed by, Article I, Sec. 8, Clause 3 of the Constitution of the United States. Therefore, whether the case is in this Court by appeal or whether the appeal be treated as a petition for certiorari, the result would be the same—the reversal of the Supreme Court of Tennessee and the remandment of the case for further proceedings not inconsistent with the views of this Court.

Respectfully submitted,

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APPENDIX "A."

Sections 1316-1318 of the Official Code of Tennessee of 1932 are as follows:

"Sec. 1316.—*Tax imposed.*—All corporations and joint stock associations organized under the laws of the State of Tennessee, other than those organized for general welfare and not for profit, and all corporations and joint stock associations organized under the laws of any other state or county for profit and doing business in Tennessee, shall, without exception, pay to the state comptroller annually an excise tax, in addition to all other taxes, equal to three per cent. of the net earnings for their preceding fiscal year of such corporations and joint stock associations, arising from business done wholly within the state, excluding earnings arising from interstate commerce. Tennessee insurance companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state."

"Sec. 1317. *Credit for certain other taxes paid.*—Any corporation or joint stock association, paying the tax imposed, shall be entitled to a credit upon the tax imposed for the amount paid, in the preceding twelve months prior to July 1st of the year in which this tax becomes due, to the secretary of state under the terms of section 4136; insurance companies shall be entitled to a credit for all amounts so paid during the preceding twelve months under section 6 of the general revenue bill, and also under section 5716, and corporations or joint stock associations engaged in mercantile pursuits and paying the merchants' privilege tax to the State of Tennessee shall be entitled to a credit for the amount so paid during such preceding twelve months; and all other corporations and joint stock associations shall be entitled to a credit upon the tax herein imposed for any amount paid to the state for such preceding twelve months under any

general revenue bill, as a privilege tax, unless otherwise expressly provided in the statute imposing the privilege tax; provided, that the tax herein imposed is a state tax levied for state purposes only, and no county or municipality or taxing district shall have power to levy any like tax."

"Sec. 1318. *Due, when; penalty.*—The tax imposed shall be due and payable on July 1st of each succeeding year; and, if delinquent thirty days, shall be subject to a penalty of one per cent. per month, and, in addition, interest at the rate of six per cent. per annum from July 1st until paid."

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IN THE

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OCTOBER TERM, 1941.

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MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, Attorney General of the State of Tennessee, et. al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

REPLY BRIEF OF APPELLANT, MEMPHIS NATURAL GAS COMPANY.

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TOOP

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Appellant attempted clearly to etch from the record the actual case of a pipe line company engaged solely in the interstate transportation and sale of gas and incidental thereto reducing the pressure and metering the gas for purposes of delivery, and maintaining a Tennessee office wherein business was transacted which related solely to this interstate transportation and sale.

Appellees in their brief have sought to overlay this picture with the insistence that appellant was engaged in making "sales direct to *consumers* on demand in Tennessee" (Appellees' Brief, pp. 4, 20) and that the "price was ascertained by a reading of the meter in each individual burner tip user's home", etc. (Appellees' Brief, p. 3.)

Moreover, it is stated that in the Tennessee office the business included "the lending of money, the purchase of oil well shares." (Appellees' Brief, p. 5.)

Apparently the statement that appellant was engaged in supplying local consumers on demand was intended to bring the case within the language of this Court in *Missouri, ex rel, Barrett vs. Kansas Natural Gas Company*, 265 U. S. 298, wherein, discussing the activities of a typical local distributing company, this Court said:

> "The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another State, and drawn for distribution directly from interstate mains."
>
> (265 U. S. 298, at 309.)

Neither this statement, however, nor the other statements in Appellees' brief, to which we referred, are supported by the record. Appellant was not engaged in distributing gas to local consumers. It distributed no gas to any consumer. Memphis Power & Light Company did tap appellant's main line at Brooks Avenue and did transport the gas through its own pipe line to Kansas Avenue, at which point Memphis Power & Light Company distributed the gas to itself, part to its generating plant for consumption and part to its lines for distribution.

Appellant did not supply gas "on demand", in the sense in which that expression is used in *Missouri, ex rel Barrett vs. Kansas Natural Gas Company,* and in which it is sought to be applied in appellees' brief. That expression as used by this Court relates to the method of distribution of a local distribution company. Such a company has gas in its mains at all times at rest so far as the household consumer is concerned. That consumer at will turns off any or all of his jets and turns them on as he desires to use the gas. Such a consumer may at his pleasure use no gas for any period of time and may resume its use at will. It is in recognition of the obligation of a local distributor to be at all times ready to supply this kind of service that such a distributor is permitted in many cases to set up as a part of his rate schedule what is known as a "demand charge."

No such situation at any time existed in the case at bar. The gas at all times was in continuous flow from appellant's main line into the lines of Memphis Power & Light Company and West Tennessee Power & Light Company. (R. pp. 40, 41, 108, 157.) It is true that this was not at all times an equal flow because some hours were "peak hours" and others normal hours. It is also true that appellant sought so far as it could by keeping in touch with the situation to know when to anticipate these "peaks." This is entirely a different situation from one where the gas is brought in and held in readiness to supply on demand.

Manifestly this situation does not justify the statement in appellees' brief (p. 10) that "this gas was delivered on orders received hourly in appellant's Memphis office." Orders were not received hourly in appel-

lant's office and there is not a scintilla of evidence in the record justifying such a statement. The only "order" was the contract between Memphis Natural Gas Company and Memphis Power & Light Company and West Tennessee Power & Light Company. To fulfill these contracts, appellant kept in touch with the situation from day to day, but the contracts were not supplemented in any sense by additional orders or demands from either Memphis Power & Light Company or West Tennessee Power & Light Company.

The statement that the price was ascertained "by reading of the meters at each individual burner tip user's home", etc., without explanation, is misleading. Apparently this statement is based upon the fact that the prices charged by appellant to Memphis Power & Light Company for the gas were ascertained by the aggregate amount used by Memphis Power & Light Company for specific purposes, which amount in turn was determined by the reading of the consumers' meters by Memphis Power & Light Company. No meter of any household consumer was read by appellant and the information as to the use was obtained by Memphis Natural Gas Company from the reports and books of Memphis Power & Light Company.

Nothing in the record justifies a statement that the Memphis office of the appellant did anything except the work necessary in relation to the interstate transportation and sale of gas.

Appellees add to this "the lending of money." (Appellees Brief, p. 5.) The record does not show that appellant's Memphis office was engaged in lending money

during the period in question. It does show that appellant borrowed money from Mississippi Power & Light Company and Arkansas Power & Light Company, to make extensions desired by those companies. There is no evidence in the record that either of these transactions was ever discussed in the Memphis office. Appellees also state that the Memphis office was concerned with "the purchase of oil well shares." There is no evidence in the record that appellant purchased any oil well shares in the years 1932 to 1935, inclusive. It did not purchase any oil well shares in those years and the record affirmatively shows that this oil transaction was in the year 1937. (R. p. 118.)

The statement that "other activities" were carried on in the Memphis office is purely gratuitous. There were no other activities. (R. p. 44.)

When the blur caused by these encrusting statements is removed, the lines of the picture sharply reappear:. Appellant was engaged solely in interstate transportation and sale of gas. Its acts in keeping informed as to the situation, in metering the gas and in reducing the pressure, were purely incidental to this interstate business.

Tending to confuse also is appellees' statement that appellant supplied gas to *consumers*. If language is used with precision, it cannot be accurately said that appellant *supplied* or *distributed* gas to *any* consumer. It is true that Memphis Power & Light Company consumed part of the gas which it received. No other person, firm or corporation received any gas from Memphis Natural Gas Company which it consumed. Memphis Natural Gas Company did not distribute to Memphis Power & Light

Company gas which that company consumed. Memphis Power & Light Company tapped Memphis Natural Gas Company's main line and distributed the gas to itself.

The mere fact that Memphis Power & Light Company took from Memphis Natural Gas Company's main line gas which it eventually consumed in its generating plant does not stamp the business of Memphis Natural Gas Company as an intrastate business. This we discussed in our original brief and should not again refer to it except for the fact that it seems to us that the question is set at rest by the recent opinion of this Court in *Illinois Natural Gas Company vs. Central Illinois Public Service Company, et al.* (Decided Jan. 5, 1942, No. 100, Oct. Term, 1941.)

It is true that the decision in that case was rested on the fact that Congress, by enacting the Natural Gas Act, had regulated the interstate activity there under consideration. It is also true that this Court found it necessary to consider whether the activities of the Illinois Natural Gas Company were such activities as had been defined to be interstate prior to the passage of this Act. It did so find, saying:

> "Appellant engages in interstate commerce in gas and in its interstate transportation as those terms had been defined by this Court, before the adoption of the Act."

The activities of the Illinois Natural Gas Company included sale and delivery to consumers, for the Court said:

> "It also sells and delivers gas to several industrial consumers in the state. The gas moves continuously,

> under pressure applied by Panhandle, from the gas fields until it enters appellant's transmission lines where appellant reduces the pressure according to the needs of its service."

In arriving at its conclusion that the pipe line company's business was interstate, this Court reaffirmed by approving citation the very cases on which appellant here relies.

Illinois Natural Gas Company vs. Central Illinois Public Service Company, et al., thus definitely holds that the consumption of natural gas by one who obtains it from an interstate pipe line does not render the business of the pipe line company intrastate business.

Inasmuch as Memphis Power & Light Company is the only person, firm or corporation in Tennessee which consumes any gas which it receives *directly* from Memphis Natural Gas Company, the use of the plural by appellees in speaking of "consumers" can only mean that this is an implied insistence that Memphis Natural Gas Company was distributing that gas which the customers of Memphis Power & Light Company received from the distribution lines of Memphis Power & Light Company. This, of course, is rested upon the claim that Memphis Natural Gas Company and Memphis Power & Light Company shared profits. No authority is cited, no argument is made, that even if there were a sharing of profits, this would make Memphis Power & Light Company the *alter ego* of Memphis Natural Gas Company. It is merely assumed that this would be the case. Thus there is a lacuna in appellee's brief because it does not attempt to show why, even if there were a sharing of profits between the

two companies (which we insist there was not), this would mean that Memphis Natural Gas Company was engaged in intrastate business because Memphis Power & Light Company was so engaged. We have pointed out already that this would, in no sense, follow where the corporations which shared the profits are separate corporate entities, independently managed and where one is not dominated by the other. In the brief filed in this Court by the appellees, no insistence is made in regard to any dominating control by Memphis Power & Light Company over Memphis Natural Gas Company, or vice-versa.

It is an understatement to say that appellees' discussion of the nature of the tax here involved does not make for clarity. We have already pointed out in our original brief that this is a tax on the privilege of *doing* business. It is not a tax upon the *right to do* business. The Supreme Court of Tennessee, in the cases cited in our original brief, has definitely so held, and no attempt is made to impune the authority of these cases. The two quotations in Appellees' Brief (p. 9) from the case of *Bank of Commerce & Trust Co. vs. Senter*, 149 Tenn. 569, do not contravene our insistence when placed in their setting and considered with the entire opinion. Nevertheless, the attempt is made (Appellees' Brief, pp. 16 and 17) to escape the binding authority of *State Tax Commission vs. Interstate Natural Gas Co.*, 284 U. S. 41, by suggesting the tax here involved is not the kind of tax there involved, but is the kind of tax involved in *Stone vs. Interstate Natural Gas Co.*, 103 Fed. (2d) 544, Affd. per curiam 308 U. S. 522.

It is only necessary to state that in the case of *State Tax Commission vs. Interstate Natural Gas Co.*, as in

the case at bar, the tax was one on the privilege of *doing* business, while in *Stone vs. Interstate Natural Gas Co.*, the tax was on the *right to do* business. In the latter case the Circuit Court of Appeals for the Fifth Circuit said:

> "We think the tax is laid on a domestic organization because of its mere existence capitalized and ready to carry on its corporate activities. It need not do anything to incur it."
>
> (103 Fed. (2d) at 548.)

And again:

> "The resident could not escape the tax by engaging in interstate commerce."
>
> (At 549.)

The question involved in the instant case is not whether the State of Tennessee could tax the corporate existence of Memphis Natural Gas Company and its right to do business in Tennessee. That is not what it taxes or attempts to tax by the statutes here involved. What it does attempt to tax by these statutes, as construed and applied by the Supreme Court of Tennessee, is the actual doing of business. This we insist it cannot do because a privilege tax cannot be levied on the privilege of engaging in interstate commerce. This because the doing of interstate commerce is a privilege that emanates from the federal power and not from the state power. It therefore can be taxed by the federal power and not by the state power. The right to engage in an intrastate business in a state, whether that right is exercised or not, emanates from the state power and can be taxed by the state power, but this situation is not presented by the case at bar.

While the question does not seem to us to be here involved, it is clear that the imposition of such a tax would interfere with the execution of a national policy because it would permit the state to tax as a privilege it conferred the privilege of engaging in interstate commerce with which it has no concern and which is not derived from any state power.

CONCLUSION.

Viewed in proper perspective all of appellant's activities — keeping itself informed as to the amount of gas it was required by its contract to deliver, metering, reducing pressure, work of the Memphis office — are seen to be limited to those things which were not only incidental but necessarily and inescapably incidental to its sole business of transporting and selling gas in interstate commerce.

The nature of that business was not changed by the fact that a distinct and independent corporation, Memphis Power & Light Company, was engaged in distributing this gas to consumers, notwithstanding the fact that the amount appellant received for the gas sold under its contract with that company might vary in accordance with the results of the business done by Memphis Power & Light Company.

The Supreme Court of Tennessee held that the privilege of engaging in this interstate commerce could be taxed by the state of Tennessee, arriving at this conclusion as the result of an erroneous conception of what is in fact interstate commerce. It is for this Court to correct that misconception as to the nature of appellant's

business, and if (as we insist) that business is solely an interstate business, then the privilege of doing that business cannot be taxed. Else every state would have the same unrestricted license to burden interstate commerce with privilege taxes which they all possessed prior to the adoption of the Constitution of the United States. It was to prevent the abuse of this power that the interstate commerce clause was included in the Constitution.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 499

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS THE APPEAL.

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS THE APPEAL.

MAY IT PLEASE THE COURT:

I.

This appeal attempts to attack the validity of the Tennessee Excise Tax Statutes, Sections 1316-1318 of the Official Code of Tennessee (1932), as construed by the officials of Tennessee and applied to the appellant. These statutes are correctly set out in the jurisdictional statement of appellant and are not therefore re-copied here. The asserted invalidity of these code sections is based on what appellant conceives to be a conflict with the commerce clause of the Constitution of the United States. This contention was first made in the Supreme Court of Tennessee and was not seriously pressed there. The original theory of the appel-

plant was that it was immune to excise taxation because of its rights and privileges under the commerce clause and this was the theory advanced in the Chancery Court of Davidson County, Tennessee. We therefore believe that the Supreme Court of the United States has jurisdiction of this case, if at all, only on certiorari under Section 237-A of the Judicial Code as amended and that the appeal was improperly granted.

II.

The Nature of the Tennessee Tax Complained of by Appellant.

The tax which appellant complains of is called an excise tax, it is a tax on corporations and joint stock associations for the privilege of doing business in Tennessee in corporate form. This is the construction placed on the law by the Supreme Court of Tennessee, '* * * The tax laid upon the privilege of conducting business as a corporation within the state is graduated upon the result of the exercise of the privilege.' *Bank of Commerce* v. *Senter*, 149 Tenn., 584.

The tax is measured by net earnings of the taxpayers from business done wholly within the State and on its face excludes net earnings arising from interstate commerce as a measure of the tax. The statutes in no way conflict with the commerce clause as construed by the Supreme Court of the United States. The tax contains no unusual provisions and is of a type many times sustained by the Supreme Court of the United States.

Atlantic Lumber Company v. *Commissioner of Corporations and Taxation*, 298 U. S. 553, 80 L. Ed. 1528, 56 S. Ct. 887.

Southern Natural Gas Company v. *Alabama*, 301 U. S. 148, 81 L. Ed. 970, and cases there discussed.

See also *McGoldrick* v. *Berwind-White Coal Mining Company*, 309 U. S. 33, 84 L. Ed. 565.

III.

The Nature of Appellant's Business and Activities in Tennessee.

Appellant is a Delaware corporation domesticated in Tennessee, it was organized in 1928 for the purpose of transporting by pipeline natural gas from Louisiana, which it purchased there and selling it in Memphis and Shelby County, Tennessee. At first appellant had only one customer, the Memphis Power and Light Company which bought for consumption in its electric generating plant in Memphis and also distributed gas to burner tip users in Memphis and Shelby County Tennessee as a joint adventure with appellant. Subsequently appellant added as customers the West Tennessee Power and Light Company (in Tennessee), the Arkansas Power and Light Company, the Mississippi Power and Light Company, and the Louisiana Power and Light Company. These customers were distributors of natural gas to burner tip users and they bought gas from appellant on an open buyer and seller basis, they with the exception of the first named also took the gas at line pressure. The Memphis operation was totally different from this, under the contract with the Memphis Power and Light Company the appellant shared the profits and losses of this company from the distribution of the natural gas. Also appellant maintained operatives in Memphis to increase or diminish the supply of gas to suit the hourly needs of the local market, one of such operatives was a dispatcher who by means of telephone controlled the input of gas in Louisiana to fit the requirements of the Tennessee market from hour to hour. The gas delivered in Memphis was reduced in pressure at the time it passed into the lines of the Memphis Power and Light Company and the West Tennessee Power and Light Com-

pany, whereas deliveries outside of Tennessee were made at an unreduced pressure or at line pressure.

Appellant maintained its principal office in Memphis, its president lived there, and all of its business was conducted from that office. All orders for gas were received in the Memphis office and all of the billing for gas delivered in Tennessee and elsewhere was from the Memphis office, all collections and disbursements, all supervision and control of the company were handled and centered in the Memphis office. While Delaware was the state of its incorporation, Tennessee was its commercial domicile.

Wheeling Steel Corporation v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143.

IV.

Only Earnings From Business Done Wholly Within Tennessee Were Used as a Measure of Tax.

Appellant was originally assessed for excise taxes in Tennessee in this proceeding on April 24, 1938 for the years 1932, 1933 and 1934 in the amount of $57,156.83 which tax was measured by the entire net income of appellant from all sources. Thereafter and on June 9, 1938 a corrected assessment was made in the amount of $54,179.31 for the years 1932, 1933, 1934 and 1935 based on the net earnings of appellant from business done in Tennessee as shown by the books and records of appellant. So, no question is present concerning the use of any earnings as a measure of tax which did not arise from business done in the market afforded and protected by Tennessee.

During the period in question in this suit the appellant's business done in Tennessee with and through the Memphis Power and Light Company constituted the following percentages of the total business done by the appellant everywhere: 1932, 83.24%; 1933, 83.08%; 1934, 81.47%; 1935, 80.06%. For the same period the business done by appel-

lant with and through the West Tennessee Power and Light Company amounted to approximately one or two per cent of the total business done. The percentage of business done in Tennessee by the direct delivery of gas to consumers on demand by appellant in furnishing gas to the electric generating plant of the Memphis Power and Light Company for fuel was: 1932, 33.49%; 1933, 33.22%; 1934, 27.78%; 1935, 24.34%, the rest of the business done in Tennessee by appellant was done under its profit sharing arrangement with this company.

The profit sharing arrangement, styled by the Supreme Court of Tennessee as a joint adventure, was contractual. It was provided in the contract for the delivery of gas to burner-tip users in Memphis and Shelby County, Tennessee that certain depreciation losses should be taken by appellant and the Memphis Power and Light Company and certain other specified arbitrary deductions were to be made by both parties from the net earnings derived from the sale of gas to these users. After these deductions were made then the surplus remaining was divided between the two companies, unless all of the deficits of both companies were made up and an excess remained over and above one and one-half per cent of the investment of the Memphis Power and Light Company, if this situation existed then the appellant received the entire overplus.

This contractual relationship furnished one of the bases for the imposition of the tax liability on appellant by the Supreme Court of Tennessee, as shown by that Court's opinion:

> "It is not necessary to determine when title to the gas passed to Memphis Power and Light Company or whether title ever actually passed. If title passed, then, still the business in distributing to consumers was for and on behalf of both these development and operating corporations, and Memphis Natural Gas Company was

engaged through its co-operative in intrastate business in Tennessee."

At the time of appellant's organization twenty-five per cent of its capital stock was given to the Electric Bond and Share Company, and appellant was a registered subsidiary of this parent corporation in the reports filed with the Securities and Exchange Commission. The supplier of gas to appellant, United Gas Company, and all of appellant's customers both inside and outside of Tennessee were subsidiaries of Electric Bond and Share Company. At all times since its organization the appellant had one or more common directors with some one of these Electric Bond and Share Company subsidiaries.

V.

Earnings Used as a Measure of Tax Not Separated.

The judgment appealed from in this case is an agreed judgment as to amount. Counsel for both parties agreed that if the appellees recovered that the amount shown in the final decree of the Supreme Court of Tennessee was the correct amount due. The appellant complained in its petition to re-hear in the Supreme Court of Tennessee that certain of its earnings should not have been included in the measure of tax, this Court in disposing of this contention said:

"This suit is to enjoin collection of taxes. If it be true there are some profits that might be ascribed to purely interstate commerce, such earnings should have been set out separately with proper definiteness of averment in the bill and then supported by proof and pointed out in the brief in order to obtain the injunction. This has not been done."

See also *Indiana* v. *Ingram-Richardson Mfg. Co.*, U. S. 61 S. Ct. 868.

VI.

No Substantial Federal Question is Involved in This Appeal.

There is no substantial federal question involved in this appeal. It is true that appellant claimed immunity from taxation under the commerce clause of the Constitution of the United States however on the facts this claim is without merit. The appellant committed a taxable act when it did business in Tennessee in corporate form. The commerce clause does not prohibit taxation of corporations by the states for the exercise of this privilege. The only other claim of conflict with the federal constitution which could be claimed is that the tax is measured by net earnings arising from business conducted in interstate commerce or business done in some state other than Tennessee. No such contention is tenable here, the only earnings used as a measure of tax were those derived from business done in Tennessee.

The fact that the goods sold by appellant in Tennessee were imported from another state does not give tax immunity to the appellant under the commerce clause. Nothing in the federal constitution prohibits a state from taxing all corporations doing business in such state alike, whether their business incidentally affects interstate commerce or is wholly remote therefrom. No requirement can be found in the constitution which requires Tennessee to discriminate in favor of interstate commerce, if we admit for the sake of argument that the business of appellant had some interstate features.

This case is practically identical on its facts with the case of *Southern Natural Gas Company* v. *Alabama, supra*, where it was held by the Supreme Court of the United States that the Alabama franchise tax did not conflict with the commerce clause.

In *McGoldrick* v. *Berwind-White Coal Mining Company*, the taxpayer claimed immunity to the New York City sales tax, its contention was based on the allegation that it was engaged solely in interstate commerce because its sales contracts contemplated shipment across state lines. The Court disposed of this contention as follows:

> "Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of coal interstate upon orders of New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.
>
> "But we think this distinction is without the support of reason or authority * * *."
>
> (Pages 53 and 54 of the opinion.)

In the present case appellant delivered gas in Tennessee on orders received hourly in its Memphis, Tennessee office. That earnings from such business may be used as a measure of corporate excise tax by Tennessee without conflict with any provision of the federal constitution is settled by the Court of last resort. It is further settled that such business is not interstate commerce but a local enterprise.

The Tennessee tax here complained of is non discriminatory. All corporations doing business in Tennessee are taxed alike, and the tax is in no sense a tax barrier. It does not place interstate commerce at a disadvantage, nor impose any undue burden thereon, nor does it in any way regu-

late such commerce. As applied to appellant on the facts of the case the tax complained of is a valid exaction and the case made and presents no federal question.

Conclusion.

Accordingly appellees move the Court to dismiss the appeal:

First, Because it was improvidently granted, the proper mode of review, if appellant is entitled to a review, is by certiorari.

Second, Because of the lack of any substantial federal question.

If it should be determined that the appeal was improvidently taken and a review can only be had on certiorari and the papers whereon the appeal was allowed are treated as a petition for certiorari, then, appellees move the Court to dismiss the writ because the questions presented have so recently been passed upon by the Supreme Court of the United States that there is no reasonable ground for the granting of a petition for certiorari.

Southern Natural Gas Company v. *Alabama*, *supra*;
Interstate Natural Gas Company v. *Stone, Commissioner*, 103 F. (2d) 544, 307 U. S. 624;
McGoldrick v. *Berwind-White Coal Mining Company*, *supra*;
Nelson v. *Sears-Roebuck*, — U. S. —, 85 L. Ed. 523.

Respectfully submitted,

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LEWIS S. POPE,
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(5753)

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, Attorney-General of the State of Tennessee, et al.,

---

Appeal From The Supreme Court of The State of Tennessee.

BRIEF FOR THE APPELLEES.

ROY H. BEELER,
Attorney-General of Tennessee;
W. F. BARRY,
Assistant Attorney-General,
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BAIRD-WARD—NASHVILLE

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Supreme Court of the United States

October Term 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs

ROY H. BEELER, Attorney-General of the State of Tennessee, et al.,
Appellees.

Appeal from the Supreme Court of the State of Tennessee, December Term 1940, Opinion not published—(Contained in the Record at pp. 371-389), the Opinion on the Petition to Rehear, appears in the Record, p. 400.

BRIEF FOR THE APPELLEES.

Appellees have heretofore filed a statement opposing jurisdiction and a motion to dismiss the appeal for want of a substantial federal question. No useful purpose could be served by restating this motion here. However, appellees rely and insist thereon, and in no sense abandon that position.

Additions to Appellant's Statement of the Case.

In order to avoid any possible confusion as to the exact facts of this case, we feel it necessary to make certain additions to Appellant's Statement, and in a sense to restate the case.

Appellant is a Delaware corporation, with its principal offices in Memphis, Tennessee. (R., pp. 60, 137, 149.) It maintained a transfer office in New York City, and a statutory office in Delaware, but no business was transacted at either of these offices. (R., p. 44.) All business of appellant was transacted in the Tennessee office. (R., pp. 44, 149.)

It delivered gas to two corporations in Tennessee—the West Tennessee Power & Light Company, and the Memphis Power & Light Company. (R., p. 39.) The first corporation distributed gas to consumers (R., p. 550); the second distributed, in partnership or joint association with appellant, some of the gas which it took, and it consumed a substantial volume of the gas itself in its electric generating plant at Memphis, Tennessee. (R., p. 540.)

Deliveries of the gas were made by appellant at ten widely separated places in Shelby County, Tennessee, and at seven widely separated places in West Tennessee. (R., p. 39.) Before delivery was made in Tennessee, the pressure of the gas was reduced from the main line pressure to a certain specified pressure (R., p. 50) and in this, the Tennessee operation drastically differed from appellant's methods of

delivery in Mississippi and other States. (R., p. 49.) In States other than Tennessee, purchasers tapped appellant's line and took gas—this gas was taken at whatever pressure happened to be in the time, and appellant did nothing to the gas to effect delivery. (R., p. 49.)

In Tennessee, Appellant maintained a dispatcher, who controlled the input of gas in the Louisiana fields, and the pressure at all times to suit the requirements of the local Tennessee market. (R., pp. 42, 43.)

Appellant had two contracts with the Memphis Power & Light Company. One of these was a Buyer and Seller Contract, wherein the appellant sold and delivered gas, on demand, upon orders received in its Memphis, Tennessee, office, to the buyer for consumption in its electric generating plant at Memphis (R., pp. 76, 86, 164); the other contract was one of partnership, or joint enterprise—appellant agreed to deliver gas to the Memphis Power & Light Company, in Memphis, for distribution there. The gas was delivered in whatever volume the market required at the time of delivery, appellant's Memphis office being advised hourly as to the requirements of the market. (R., pp. 42, 43.)

The gas was delivered at a price determined by the use to which the gas was put by the burner-tip user, and this price was ascertained by a reading of the meters in each individual burner-tip user's home, place of business, plant, etc., there being five different classifications fixed by the contract. (R., p. 59.)

A monthly statement was made between the parties based upon the amount of gas furnished for the various uses and at the varied prices fixed for such uses, but these monthly statements were not final. At the end of the year when the profits and losses had been determined from the distribution of natural gas in Memphis and Shelby County, Tennessee, these profits or losses were divided between the two parties, as provided in the contract. (Exhibit "A" to Johnson, Clause 1, R., pp. 509, 460; Explanatory Note, Exhibit "C"—2-3, 4-5, to Binswanger, R., pp. 424, 441, 50, 58.)

Appellant, when organized in 1928, had no business outside Tennessee. Subsequently, certain public utility companies tapped appellant's lines in Louisiana, Arkansas and Mississippi. However, the bulk of appellant's business is still done in Tennessee. During the years in question in this case, appellant's business done in Tennessee with the Memphis Power & Light Company constituted the following percentages of the total business done by appellant:

1932, 83.24%; 1933, 83.08%; 1934, 81.47%; 1935, 80.06%. (R., p. 85.)

The business done with the West Tennessee Power & Light Company during the years in question amounted to only about one or two per cent. The percentage of appellant's business represented by sales direct to consumers, on demand, in Tennessee (the electric generating plant of the Memphis Power & Light Company, at Memphis), was as follows:

1932, 33.49%; 1933, 33.22%; 1934, 27.78%; 1935, 24.34%. All of the remaining business done by appellant in Tennessee was done in partnership with the Memphis Power & Light Company. (R., p. 86.)

All orders for gas were received by appellant in Memphis; all disbursements; all banking and other business, including the lending of money, the purchase of oil well shares, and other activities, were carried on there. The president of the appellant lived in Memphis, and conducted the entire business of the corporation in that city.

The original tax assessment in this case was made on April 24, 1938, and the measure used was the net earnings of appellant from all sources for the years 1932, 1933 and 1934. This assessment was in the amount of $57,156.83. Thereafter, on June 9, 1938, a corrected assessment was made in the amount of $54,179.31 for the years 1932, 1933, 1934 and 1935. This reduced assessment was made upon the basis of appellant's statement of earnings in Tennessee for those years and it excluded all earnings arising from business done outside Tennessee and it is the latter amount, with interest, recovered in this case. (R., p. 583.)

At the time of appellant's organization, twenty-five (25%) per cent of its capital stock was gratuitously given to Electric Bond and Share Company, and appellant is a registered subsidiary of this holding company in the reports filed with the Securities and Exchange Commission. The supplier of gas to appellant, United Gas Company, and all corporations which were supplied gas by appellant, both

inside and outside Tennessee, were subsidiaries of Electric Bond and Share Company. At all times since its organization appellant has had one or more common Directors with one of these Electric Bond and Share Company subsidiaries.

Summary of Argument.

(1) The tax sought to be collected from appellant is an excise, franchise or privilege tax, levied on corporations and joint stock associations, foreign or domestic, for the privilege of engaging in business in Tennessee in corporate form. It is in no sense a tax on the general doing of business in Tennessee, and relates only to corporations or joint stock associations which derive their life and right to do business in Tennessee from the sovereign legislative powers of Tennessee. The tax measure is three per cent (3%) of the net earnings of the taxpayer from business done wholly within Tennessee, and all other privilege taxes are allowed as credits upon the tax. Therefore, the statute obviously could not be a burden on, or regulation of, interstate commerce. (*Infra*, pp. 8-10.)

(2) Appellant, a Delaware corporation, with its legal, commercial and business domicile in Tennessee, conducted a local business in Tennessee; it sold gas to consumers in Tennessee, on demand, upon orders received in its Memphis office; it distributed natural gas in Tennessee to burner-tip users or consumers, in partnership or association with its corporate affiliate. (*Infra*, pp. 10-13.)

(3) Only those net earnings which arose from business done wholly within Tennessee were used as a measure of the tax. Under the circumstances, we contend that the imposition of the corporate privilege or franchise tax for admittedly exercising corporate powers in Tennessee, measured by the amount of business done in Tennessee, did not constitute an undue burden on interstate commerce, but only affected it remotely or incidentally, if at all. (*Infra*, pp. 13-16.)

(4) There is no decision of this Court to the contrary; and certain apparently adverse statements in some decisions which were not relevant on the facts of the case, were made without reference to a situation such as this. (*Infra*, pp. 16-18.)

(5) Principles relating to the power of Congress to regulate interstate commerce generally, are inapplicable. The question is whether a particular exercise of the State's power to tax, in view of its nature and operation, presents any obstacle to the execution of the national policy. (*Infra*, pp. 18-20.)

ARGUMENT.

The Appellee's position in this case is that considering the matter either upon broad and substantial commerce questions, or upon narrow doctrinaire legalistic theories, the case presents no substantial federal question.

The Nature of the Tennessee Excise Tax and Its Incidence.

(1) This tax statute accords all corporations that do business in Tennessee, equal treatment, and is in no sense a tax barrier. No discrimination is made in favor of intrastate commerce. The statute taxes all corporations and joint stock associations, foreign or domestic, which do business in Tennessee, and then measures the amount of the tax by three per cent (3%) of the net earnings from the business done wholly within Tennessee. (Sec. 1316-18 Code of Tennessee.)

This tax, on its face, of course, does not violate any provision of the federal constitution. (*Coverdale* v. *Arkansas-Louisiana Pipeline Company*, 303 U. S., 604; *Henneford* v. *Silas Mason*, 300 U. S., 557; *Southern Natural Gas Co.* v. *Alabama*, 301 U. S., 148; *Western Livestock Assn.* v. *Bureau of Revenue*, 303 U. S., 250; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S., 33.)

A state is at liberty to levy a non-discriminatory privilege tax upon corporations doing business in such state, and there is no federal requirement that a state favor interstate commerce over intrastate commerce. This is true in the

absence of Congressional action; and at the time covered by this suit, the Natural Gas Act had not been passed, and Congress had not asserted the national power to regulate interstate transportation of natural gas through the Federal Power Commission.

The Supreme Court of Tennessee, in construing the tax here involved, has said:

> "In *Flint* v. *Stone Tracy Co.*, 220 U. S., 151, 31 Sup. Ct., 342, 55 L. Ed., 389 Ann. Cas., 1912B, 1312, the court said the tax may be described as an excise upon the particular privilege of doing business in the corporate capacity; i. e., with the advantages that arise from the corporate or *quasi*-corporate organization. We think this properly characterizes the tax levied by the act in controversy."
>
> *Bank of Commerce & Trust Co.* v. *Senter*, 149 Tenn., 569, at p. 583 of the opinion.

Further in the same opinion, the Court uses this language:

> "The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade." At page 587 of the opinion.

Surely, as construed by the Tennessee Court, the statute meets all requirements of the commerce clause of the Federal Constitution.

The Nature of Appellant's Business, and the Application of the Tennessee Excise Tax to That Business.

(2a) Appellant sold gas to the Memphis Power & Light Company for consumption in its electric generating plant at Memphis. This gas was delivered on orders received hourly in appellant's Memphis office. That this is a local business, was determined by this Court in *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S., 148.

On the whole, there is no difference between the business of appellant and the Southern Natural Gas Company concerning this consumption contract; and when speaking of this business, appellant's president, Mr. Johnson, said:

> "Then there is the Southern Natural Gas Company that brings gas from the Monroe fields into the East into Birmingham and Atlanta. Well they are in the same—much the same in the nature of its business to ours." (R., p. 121.)

Appellant tries to distinguish this case from the Southern Natural Gas Corporation case, upon the legalistic and technical ground that in the Southern Natural Gas Company case the Court predicated tax liability upon the fact that short service lines were installed by the Seller to deliver the gas to the Purchaser; whereas, in the present case, it claims no such lines were installed. This Court recently declined to accept such a narrow view of the case, however.

See the case of *Illinois Natural Gas Co.* v. *Central Illinois Public Service Commission, et al.* (decided January 5, 1942, No. 100, October Term, 1941), where Mr. Chief Justice Stone interprets the decision in the Southern Natural Gas Corp. case, thus:

> "In *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S., 148, 156-57, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all of the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

The clear meaning of this interpretation is that it is the nature of the business carried on, rather than any legalistic or technical detail which controls. The decision in *Southern Natural Gas Corp.* v. *Alabama, supra,* was forecast by the opinion in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S., 465, and *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U. S., 298, in which latter case this language occurs:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

Appellant's Partnership, or Joint Enterprise, with the Memphis Power & Light Company in Distributing Gas to Burner-Tip Users in Tennessee.

(2b) Appellant and the Memphis Power & Light Company jointly distributed gas to burner-tip consumers in Memphis. The appellant brought the gas into Tennessee, turned it over to the Memphis Power & Light Company for retail distribution, was paid for the gas upon the basis of the measurement made at the point of delivery to the burner-tip user, and then at the end of each calendar year the appellant and the Memphis Power & Light Company divided the profits or losses from this particular business.

The Supreme Court of Tennessee held this to be a joint enterprise sufficient to this phase of the business to use those earnings arising therefrom as a measure of the tax. The Court said:

> "It is not necessary to determine when title to the gas passed to the Memphis Power & Light Company, or whether title ever actually passed. If title passed, then, still the business in distributing to consumers was for and on behalf of both these development and operating corporations, the Memphis Natural Gas Company was engaged through its co-operative in intrastate business in Tennessee."

As a striking illustration of the soundness of the holding of the Tennessee Court, let us say that the appellant accused the Memphis Power & Light Company of creating a fictitious reserve at one time, and contended that this reserve was actually net profits from the distribution of gas in

Memphis, to which appellant was entitled to fifty per cent (50%). The Memphis Power & Light Company claimed that this was a replacement, or depreciation reserve. The matter could not be adjusted amicably and the Memphis Natural Gas Corporation filed suit against its partner, or joint *entrepreneur*, on account of the profits of the gas distribution business in Memphis, and relied upon the clause in the contract for the division of profits and losses as the basis of its suit. The suit was compromised and settled in favor of the appellant and it received over a quarter of a million dollars as its share of this fund created by the joint distribution of gas in Memphis.

The Chief Engineer of appellant was asked what was necessary for appellant to do to effect this distribution of gas to consumers in Memphis, and he replied "It is necessary for us to keep in touch with the requirement of the various markets from hour to hour, and to operate our stations and our lines to suit the conditions that prevail at any time." (R., pp. 42, 43.)

It is perfectly apparent from all of the above that appellant carried on a local business in Tennessee which subjected its net earnings to use as a measure of its tax liability.

Only Those Earnings Arising from Business Done Wholly in Tennessee Were Used as a Measure of the Tax.

(3) The earnings of appellant from business done outside Tennessee were excluded, and the earnings used as a measure of tax in this case arose from business done wholly

within Tennessee with the Memphis Power & Light Company and the West Tennessee Power & Light Company.

The judgment entered in the Supreme Court of Tennessee is an agreed judgment as to amount, the appellant conceding at the time the judgment was entered that if any tax was due, the sum was correctly set out.

Under the circumstances, we contend that the imposition of this tax for engaging in a local business in Tennessee did not constitute a burden on interstate commerce, nor amount to a regulation of such commerce; but if it did affect it at all, the effect was remote and incidental.

The taxing authorities in this case followed the opinion of the Supreme Court of Tennessee in *Bank of Commerce* v. *Senter, supra.* The Court said (p. 588):

> "The tax laid upon the privilege of conducting business as a corporation within the State is graduated upon the result of the exercise of the privilege. . . .
>
> ". . . Measuring the tax by net earnings from business done in the State is not discriminatory, because it excludes from the measure those earnings of foreign corporations, which cannot be taxed, and then classifies all corporations both domestic and foreign on the same basis." [Equality is the theme—cf. *Henneford* v. *Silas Mason, supra.*]

In *Hump Hair Pin Mfg. Co.* v. *Emmerson,* 258 U. S., 290, the Court in sustaining the Illinois franchise tax, commented upon the statute as according "exactly equal treatment of foreign and domestic corporations of like character."

Generally speaking, a State may not levy a tax which directly burdens interstate commerce. However, the mere fact that a tax indirectly or incidentally affects interstate commerce, does not constitute a burden on it.—See *Hump Hair Pin Mfg. Co.* v. *Emmerson, supra* (at p. 294 of the opinion), where this rule is enunciated:

> ". ... While a state may not use its taxing power to regulate or burden interstate commerce, . . . on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal Constitutional rights. . . . The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect, it."

If we concede, for the sake of argument, that appellant was engaged to some extent in interstate commerce, then, under the facts of the present case the tax only remotely and incidentally affected interstate commerce. This Court, in the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* observed:

> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the State tax burdens."

When the facts of this case are considered in the light of the decisions of this Court, it is apparent that there is no substantial federal question involved. In the first place, the appellant's earnings used as a measure of tax arose from intrastate business; and if we admit, for the purpose of discussion, that those earnings came indirectly from interstate commerce, then the tax only remotely or incidentally affected such commerce. The Tennessee Excise Tax as applied to the appellant in its incidence fell upon the local business of distributing gas to consumers and burner-tip users in the State of Tennessee, upon demand, on orders received in the Memphis office of appellant.

No Decision of This Court Is Contrary to the Result Reached by the Supreme Court of Tennessee.

(4) The chief case relied on by the appellant as controlling is *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S., 41. This case did not concern a franchise or excise tax, and was properly distinguished by this Court in *Southern Natural Gas Co.* v. *Alabama, supra.*

The Mississippi pipeline tax involved in the Interstate Natural Gas Co. case, was a tax that was levied "upon each person engaging, and/or continuing in this State in the business of operating a pipe line, or transporting in or through this State, oil or natural or artificial gas through pipes, and/or conduits, as follows:"

The Interstate Natural Gas Company had no office in Mississippi, did not deliver gas, on demand, in that state,

neither billed nor collected for the gas delivered in that state from any point in Mississippi; and as remarked by Chief Justice Hughes, in *Southern Natural Gas Corp.* v. *Alabama*, at p. 156 of the opinion, the case "rested upon the conclusion that what was done was wholly incidental to interstate commerce between Louisiana and Mississippi. There were no such local activities as are present here to carry the transactions of the company into the field of State authority."

Subsequent to the decision in the Interstate Natural Gas Company case, Mississippi passed an excise, or franchise tax on corporations. The Interstate Natural Gas Company again asserted its non-liability for taxation in Mississippi, and upon the same agreed statement of facts, liability was imposed by the Circuit Court of Appeals, which reversed a three Judge Federal Court holding contrary in Mississippi (103 Fed. (2d), 544), and petition for *certiorari* was granted by this Court (*Stone* v. *Interstate Natural Gas Co.*, 307 U. S., 620). Thereafter, in a *per curiam* opinion, the judgment of the Circuit Court of Appeals was affirmed by this Court upon the authority of *Southern Natural Gas Co.* v. *Alabama, supra.* (308 U. S., 522.)

It is indeed difficult to see what direct bearing *Ozark Pipeline Co.* v. *Monier*, 266 U. S., 555; or *State Tax Commission* v. *Interstate Natural Gas Co., supra*, have on this case.

In the *Ozark Pipeline Company* case, oil was neither received nor delivered in Missouri, and nothing was done

there except in the furtherance of transportation. This case as well as the *Interstate Natural Gas Company* case, are properly distinguished from a case such as the present one, by the Court in *Southern Natural Gas Corp.* v. *Alabama*, *supra*.

The Imposition of the Tennessee Excise Tax on Appellant Does Not Interfere with the Execution of Any National Policy.

(5) The principles relating to the power of Congress to regulate interstate commerce generally, are inapplicable in this case. No interference with the execution of the national policy is presented here; first, because the tax in its incidence falls upon a local business; and second, if the tax in any way affects interstate commerce, it does so only remotely and incidentally.

Again, if we accept appellant's premise, for the sake of debate, that its business has some interstate commerce features, this, of course, would not withdraw its earnings from the field of state taxation. This Court has for some time recognized the proposition that the mere fact that the flow of interstate commerce is subject to the regulating power of Congress does not necessarily mean that a state may not tax such business property or transactions connected with that flow. In *Minnesota* v. *Blasius*, 290 U. S., at p. 8 of the opinion, it is said:

> "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate commerce, but rather whether a particular exer-

cise of the state's power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority."

And again: In *Federal Compress & Warehouse Co.* v. *McLain*, 291 U. S., 17, Mr. Justice Stone said (p. 23):

"'. . . the mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

"(Cf. *Susquehanna Power Co.* v. *Tax Commission, supra; Broad River Power Co.* v. *Query, supra;* See *Willcutts* v. *Bunn*, 282 U. S., 216, 226, 230, 75 L. Ed., 304, 307, 309, 51 Sup. Ct., 125, 71 A. L. R., 1260.)"

This answers the appellant's contention that it is not subject to Tennessee taxation because the Federal Power Commission has assumed jurisdiction over its business; and here it might be said also that the Natural Gas Act was not passed until the tax in question had accrued.

The above quotations also distinguish the case of *Public Utilities Commission of Kansas* v. *Landon*, 249 U. S., 236, relied on by appellant, from the case at bar.

In the very recent case of *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Com., et al., supra*, Mr. Chief Justice Stone had occasion to discuss this proposition; and it is evident, from the opinion in that case, that the Court did not depart from the contention of the appellees here.

CONCLUSION.

Tennessee afforded the opportunity to appellant to have any net earnings whatever; it afforded the market; its Government afforded the protection for this enterprise; the earnings came from Tennessee; the business competed with other Tennessee enterprises which paid their proportionate share of the cost of Tennessee Government; to allow appellant to avoid its just share of the tax burden would be to discriminate against other local businesses in Tennessee. There is no obstacle to taxation of appellant, contained in the decisions of the Supreme Court of the United States construing the commerce clause.

All of the earnings of appellant here used as a measure of tax, arose from intrastate business conducted wholly within the State of Tennessee.—

(1) It sold gas to the Memphis Power & Light Company (under the electric generating plant contract) to a consumer wholly within Tennessee, on demand, upon orders received in appellant's principal office in Memphis.

(2) Appellant engaged in selling gas to consumers wholly within Tennessee, in partnership or joint enterprise with its corporate affiliate, Memphis Power & Light Company.

Practically the entire earnings of appellant arose from business done wholly within Tennessee, and all of the earn-

ings here used as a measure of tax came directly from local business done wholly within Tennessee.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1941.

Memphis Natural Gas Company, Appellant, *vs.* Roy H. Beeler, Attorney General of the State of Tennessee, et al.	Appeal from the Supreme Court of the State of Tennessee.

[March 30, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether a tax laid pursuant to §§ 1316-1318 of the Tennessee Code of 1932 upon the Memphis Natural Gas Company's net income derived from sales of natural gas in Tennessee, during the years 1932 to 1935, violates the commerce clause.

The case comes here by appeal from a judgment of the Supreme Court of Tennessee, which sustained the tax and reversed a decree of the Tennessee chancery court enjoining its collection. Appellant contends that the case is properly an appeal, under section 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a), because the validity of the Tennessee statute as applied to the facts of this case has been drawn in question. Cf. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. But appellant's bill of complaint, filed in the chancery court, alleged only that the assessment of the tax and the threatened levy violated its rights under the commerce clause. Our decisions have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under section 237(a). *Jett Bros. & Co.* v. *City of Carrollton*, 252 U. S. 1; *Miller* v. *City of Denver*, 290 U. S. 586; *Baltimore National Bank* v. *State Tax Commission*, 296 U. S. 538; *Irvine* v. *Spaeth*, No. 596 this Term, decided October 13, 1941. It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judi-

cial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, cf. *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, 462-63; *Jacobi* v. *Alabama*, 187 U. S. 133, 135-36; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, and appellant's burden is to show affirmatively that we have jurisdiction. *Chicago, Indianapolis etc. Ry. Co.* v. *McGuire*, 196 U. S. 128, 132; cf. *Lynch* v. *New York*, 293 U. S. 52, 54-55; *Enriquez* v. *Enriquez* (*No. 2*), 222 U. S. 127, 130; *Brady* v. *Terminal Railroad Assn.*, 302 U. S. 678.

The first opinion rendered by the Supreme Court of Tennessee made no mention of any federal question, and in a supplemental opinion the court stated only that "the claim of federally protected right was decided adversely to complainant". Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by section 237(c) of the Judicial Code as amended, 28 U. S. C. § 344(c), certiorari is granted and we proceed to consider the merits of the case.

Taxpayer, a Delaware corporation, was engaged during the period in question in the business of purchasing natural gas in Louisiana and transporting it through its pipeline to points in Tennessee where it delivered the gas into the pipelines of two distributing companies—Memphis Power & Light Co. and West Tennessee Power & Light Co.—which sold the gas to local consumers. Taxpayer sells some of its gas in other states, but in Tennessee it sells from 1 to 2% of its output to the West Tennessee Power & Light Co. and delivers 80% or more to the Memphis company. That company distributes it to consumers under a contract with taxpayer which the Supreme Court of Tennessee has

found to be a joint undertaking of the two companies whereby taxpayer furnishes gas from its pipeline, the Memphis company furnishes facilities and service for distribution and sale to consumers, and the proceeds of the sale, after deduction of specified costs and expenses, are divided between the two companies.

Taxpayer is licensed by the State of Tennessee to do business there. It maintains a statutory office in Delaware and a stock transfer office in New York City, but conducts no business at either. It manages its business from its office in Memphis, Tennessee, where it keeps its accounts, provides for the payroll of employees on its line in Tennessee and other states, and prepares and sends out bills for gas delivered in Tennessee and other states. It has thus established a commercial domicile in Tennessee by virtue of which it is subject to taxation there upon its intangibles, unless such taxation infringes the commerce clause. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193.

Section 1316 of the Tennessee Code of 1932 imposes on all foreign and domestic corporations doing business for profit in the state an annual excise tax of "three per cent. of the net earnings for their preceding fiscal year . . . arising from business done wholly within the state, excluding earnings arising from interstate commerce." The Supreme Court of Tennessee sustained the tax on the ground that it was laid on appellant's net earnings from the distribution of gas under its contract with the Memphis company, which distribution it held not to be interstate commerce within the meaning of the statute. It decided that by virtue of their contract the companies became in effect partners or joint enterprisers in the distribution and sale of the gas to Tennessee consumers, the net earnings from which are taxable under the statute.

On petition for rehearing, taxpayer asked a modification of the decree on the ground that included in the measure of the tax were profits derived from sales of gas to the West Tennessee Power & Light Co. and from certain other sales to the Memphis company, not under the joint adventure agreement, which it was insisted were concededly sales in interstate commerce. The court rejected this contention upon the adequate state ground, not challenged here, that taxpayer had failed to show what portion, if any, of the taxed profits was derived from such sales and consequently had laid no basis for an injunction restraining collection of that part of the tax.

This Court has often had occasion to rule that the retail sale of gas at the burner tips by one who pipes the gas into the state or by a local distributor acquiring the gas from another who has similarly brought it into the state is subject to state taxation and regulation. *Public Utility Comm.* v. *Landon*, 249 U. S. 236; *East Ohio Gas Co.* v. *Tax Comm'n.*, 283 U. S. 465; *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 154; cf. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. —. It follows that if the Supreme Court of Tennessee correctly construed taxpayer's contract with the Memphis company as establishing a profit-sharing joint adventure in the distribution of gas to Tennessee consumers, the taxpayer's net earnings under the contract were subject to local taxation.

The meaning and effect of the contract, so far as they establish taxpayer's participation in and ownership of profits derived from the retail sale of the gas, are local questions conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis. See *Broad River Co.* v. *South Carolina*, 281 U. S. 537, and cases cited. We examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue.

The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis company of its franchise to distribute gas to consumers, and execution of the contract was a condition of the grant of the franchise. By the contract the Memphis company undertook to establish its distribution system. Taxpayer undertook to construct its pipeline with facilities, including measuring stations at a delivery point, for supplying the Memphis company with a varying flow of gas into the service pipes as and when required by the Memphis company for consumer needs. The amount so furnished, less certain deductions covered by a separate contract not now material, was to be divided into five classes, according to the use made of the gas by consumers, and was to be billed by taxpayer to the Memphis company at five different specified rates. The amount of gas allocated to each class was to be in proportion to the amount of that class of gas sold by the Memphis company for like use during the preceding month.

At the end of each year the combined net surplus or deficit of the two companies was to be divided between them by a cash settlement. The surplus or deficit of each was to be arrived at by deducting from its gross revenues the operating costs, costs of property restorations and replacements, taxes, amortization of investment, and 6% upon investment. After all net deficits of both parties had been made up and the Memphis company had received from the combined net surpluses 1½% of its total investment annually, any additional combined net income was to be paid to or retained by taxpayer.

The contract provided for readjustment from time to time of the billing price of the gas supplied by taxpayer so as to admit of reduction in the rates to consumers, after first allowing "a reasonable return" on taxpayer's investment. The contract contains the usual provisions for inspection of books by the parties and the city, and a clause requiring all notices to be given to taxpayer at its Memphis office.

The Supreme Court of Tennessee held that the city was a party to the contract entitled to the benefits of its provisions for rate reductions. It held that the circumstance that taxpayer and the Memphis company were designated by the contract as "seller" and "buyer" did not alter or obscure the fact that taxpayer was a participant in the profits derived from the joint undertaking and that the precise time when the title to the gas passed, if it passed before distribution to consumers, was immaterial. In any case it thought that the tentative amounts to be paid by the Memphis company for the gas in the first instance were to be determined after delivery by the use made of it by consumers.

We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer did not do such a business in the state that the profits derived from it are not an appropriate measure of the tax.

Taxpayer's contribution to the joint undertaking with the Memphis company for the distribution of gas to local consumers, and

its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis company. *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 155-56; *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553; *Southern Gas Corp.* v. *Alabama, supra.* Since it was competent for the state to tax such business done within it, it was competent to measure the tax by the net earnings of the business as well as by the capital employed. See *Southern Gas Corp.* v. *Alabama, supra*, 156-57.

In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. *Wheeling Steel Corp.* v. *Fox, supra*, or upon net income derived from within the state, *Shaffer* v. *Carter*, 252 U. S. 37, 57; *Wisconsin* v. *Minnesota Mining Co.*, 311 U. S. 452; cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, is not prohibited by the commerce clause on which alone taxpayer relies. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119-30; cf. *Bass, etc., Ltd.* v. *Tax Comm.*, 266 U. S. 271; *Western Live Stock Co.* v. *Bureau*, 303 U. S. 250, 255. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. *Underwood Typewriter Co.* v. *Chamberlain, supra*; cf. *Bass, etc., Ltd.* v. *Tax Comm., supra*; *Butler Bros* v. *McColgan*, 315 U. S. —. It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.

Appeal dismissed for want of jurisdiction. Certiorari granted and judgment affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.